TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 529.

I. CLIFTON MOSES AND EUGENE BEBEE, PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND ALDERMEN AND COMMON COUNCIL OF THE CITY OF MOBILE ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED DECEMBER 2, 1872.

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1 Supreme court of Alabama. January term, 1872.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and held according to law, at the capitol, in the city of Montgomery, on the first Monday of January, in the year of our Lord one thousand eight hundred and seventy-two, being the first day of said month.

Present, and presiding as judges of said court, Honorable E. W. Peck, chief justice; Honorable Tho's M. Peters, associate justice; Honorable B. F. Saffold, associate justice.

A transcript of the record and proceedings had in a certain cause heretofore pending in the court of chancery, at Mobile, for the first district of the southern chancery division of the State of Alabama, wherein I. Clifton Moses and Eugene Beebe are complainants, and The Mayor, Aldermen, and Common Council of the City of Mobile—Martin Horst, mayor; R. M. Quinn, chief of police; and Oliver Keeler, Thomas McPhillips, Lewis Kossens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile—are defendants.

Original bill.

STATE OF ALABAMA, *Mobile County:*

2 In chancery, at Mobile, first dist. southern chancery division.

To the Honorable Adam C. Felder, chancellor of the southern chancery division of the said State:

Your orators, I. Clifton Moses and Eugene Beebe, the former residing in Mobile, and the latter in Montgomery County, in said State, and both are over twenty-one years of age, show to your honor, and complain and charge—

1st. That an act of the legislature of the State of Alabama, approved December 31st, 1868, entitled "An act to establish the Mobile Charitable Association, for the benefit of the common-school fund of Mobile County, without distinction of color," granted to your orators and one Frederic H. Fowler, and their associates, as partners, certain rights and privileges on certain conditions, that is to say, in consideration that the said parties should, "before commencing business under the provisions of this act, pay, or cause to be paid, to the board of school commissioners of Mobile County, for the use of the public schools of said county, the sum of one thousand dollars, and annually thereafter a like amount for the term of ten years, or so long as said partnership shall choose to do business under the provisions of said act, they, the said parties and their associates, were invested with the full right and authority to form themselves into a partnership association, to be known under the firm-name and style of I. C. Moses & Co., or such other name as they may designate, for the purpose of receiving subscriptions, and to sell and to dispose of certificates of subscription, which shall entitle the holders thereof to such prizes as may be awarded to them, which distribution of awards shall be fairly made in public by casting of lots, or by lot, chance, or otherwise, in such manner as to them may seem best to promote the interest of the school-fund of

3 Mobile County, which said distribution of awards and prizes shall be made at their office, in the city of Mobile, or such other place or places in the State as they may direct."

2d. That, under the provisions of said statute and the powers and authority thereby conferred upon them, the said parties named therein formed themselves into a partnership association under the said name of I. C. Moses & Co., in the city of Mobile, and thereafter, before commencing business under the provisions of said act, they paid to the board of school commissioners, through its secretary, C. A. Bradford, who had authority to receive the same, on the 2d day of February, 1869, the sum of one thousand dollars, as required by the terms of said statute, and took his receipt therefor; a copy of which receipt is hereto attached as Exhibit No. 1, as part of this bill of complaint.

3rd. That, on the 17th day of September, 1869, your orator, I. C. Moses, became possessed of the interest of said Frederic H. Fowler, by purchase, and he and the said Eugene Beebe are now, and from the time last aforesaid have been, the only parties interested in said association of I. C. Moses & Co., or having any of the rights, powers, and privileges granted or conferred by said act of the legislature.

4th. That your orators, on the 30th day of November, 1869, paid to H. S. Whitfield one thousand dollars as the next payment required under the said act, and took his receipt therefor; a copy of which receipt is hereunto attached as Exhibit No. 2; and said payment last aforesaid was made to said Whitfield, as commissioner of lotteries, under the act of the legislature, approved December 31st, 1868, entitled "An act to regulate lotteries," and was paid under the following provisions of last said act: He, the commissioner, "shall also collect and pay over to the proper officers, or to the beneficiaries specified in the charters or grants, all moneys directed or required in the charters or grants to be paid over."

4 5th. That, before the time arrived for the third annual payment of the thousand dollars, as provided in said act, your orators were ready to pay the said annual payment, when the county superintendent of education of Mobile County, George L. Putnam, was removed or suspended from his said office, as such county superintendent, by the order of Joseph Hodgson, the superintendent of public instruction for the State, and W. T. Walthall appointed county superintendent of education for said county by said superintendent of public instruction; but the said Geo. L. Putnam denied the legality of his removal or suspension, and filed a bill in chancery to enjoin said Walthall from receiving any moneys belonging to the school-fund of said county, and obtained the injunction, which was issued and served on said Walthall, and which injunction continued in force until after the election held in Mobile, March, 1871, for county superintendent of education for Mobile County; and said Putnam, on the 11th day of January, 1871, or about that day, served a notice on orators not to pay over any moneys in their hands, due to the school-fund of said county, to any person or persons, except to himself; a copy of which is hereto attached as Exhibit No. 3; and they aver the only moneys in their hands, at the time of said notice, or to which said notice referred, was said third annual payment as aforesaid; and that, under the acts of the board of education of the State, the county superintendent of education for Mobile County was authorized by law, and was the proper person to receive the third annual payment as aforesaid.

6th. That, under the circumstances, not knowing to whom the said third annual payment should be made, they held the same until

5 after an election for county superintendent of education of Mobile County was held in March ,1871, at which election E. R. Dickson was elected; and, after he qualified as such county superintendent, on

the 19th day of April, 1871, they paid to him one thousand dollars as said third annual payment, and received from him a receipt therefor, a copy of which is hereto attached as Exhibit No. 4; and that the board of school commissioners of said county sanctioned and approved this payment, as will appear by the resolutions adopted at a meeting thereof on the 24th day of April, 1871, as shown in the communication of their secretary, J. J. Delchamps, a copy of which is hereto attached as Exhibit No. 5.

7th. That, in order to carry on their business under the provision of said act granting them the privilege, therefore, your orators and the said Fowler previous to the acquisition by your orator, the said Moses, of the said interest of said Fowler, laid out and expended large sums of money in providing furniture, apparatus and fixtures, and since the acquisition of said interest of said Fowler by your orator, said Moses, your orators have laid out and expended other large sums of money in the further purchase of furniture, apparatus, fixtures, and materials, and in the renting of rooms, and the employment of agents necessary for the prosecution and carrying on their said business, and for the use and enjoyment of the said franchises and privileges granted by the said first act, and purchased by your orators as aforesaid.

8th. That they were, until interferred with, as hereinafter shown, engaged in their said business, and in the full use and enjoyment of their said franchises and privileges, in the city of Mobile, and conducting the same in the name of E. Beebe & Co., as they were authorized by
6 last said act, and conducting their said business in strict and entire accordance with the terms of and provisions of last said act; that, in pursuance of their said business, they sold and disposed of certificates of subscription, which, by the terms thereof, and in fact entitled the holders thereof to such prizes as might be awarded to them in the casting of lots as aforesaid, and that the distribution of awards was in each case made fairly in public by the casting of lots. That, for the purposes aforesaid, they adopted the means or contrivance of what is called a roulette wheel and ball as the lot or chance, which to them seemed best to carry out the objects and purposes of last said act.

9th. That the roulette-wheel is a revolving circle with a number of holes attached thereto, each of which is numbered, and the wheel is revolved in one direction and at the same time a ball is thrown revolving upon, and inside of said wheel in the opposite direction from that in which the wheel is revolved, and when the ball settles down in any one of the holes, the number attached to that hole is entitled to a prize, and that they have in all cases cast lots as aforesaid, and in the manner aforesaid fairly and in public, and made such distribution of awards and prizes fairly, and in public, and that in each case of said casting of lots as aforesaid, there was only one set of said certificates sold or disposed of. New certificates being sold and disposed of for each of said castings of lots as above said and described.

10th. That while they were thus pursuing their business in the manner aforesaid, certain members of the police force of the city of Mobile, on or about the 2d day of April, 1870, and from thence repeatedly until about the 9th day of June, 1870, intruded themselves into and upon the premises and place of business as aforesaid of your orators, and arrested your orator, I. C. Moses, and the agents of your orators employed
7 by your orators to carry on said business, and that these arrests were made under the pretense that your orators and their agents in thus carrying on their said business, were violating in the said pursuit of their said business on ordinance of the city of Mobile, against

exhibiting a gaming-table, a copy of which ordinance is hereto attached and marked Exhibit No. 6. And said members of said police have arrested various persons, purchasers of said certificates of subscription, and interested in and attending to the drawing or casting of lots as aforesaid to determine who was entitled to a prize therein on the pretense that they are violating an ordinance of said city of Mobile, which imposes a penalty against any person playing or betting at a gaming-table or game of chance, a copy of which ordinance is hereto attached as Exhibit No. 7.

11th. That by these arrests your orator, I. C. Moses, and the said agents of your orators, were put to great annoyance and vexation, and subjected to great expense and trouble, and the persons, the holders of said certificates who were arrested as aforesaid were also put to great annoyance and vexation, and expense in money; and by reason thereof, your orators were compelled to suspend and did suspend their said business for a great lenght of time, and were deprived of and lost the profits, which they otherwise would have derived from their said business.

12th. That they are informed and believe and so charge, that said arrests were made by persons who are not able to respond in damages for the trespasses thus committed; that neither of the members of the police force making said arrests, were or are worth more than the amount of property exempt by law from levy, and sale under execution.

8 13th. That, in addition to the wheel and ball as above stated, they also at times, since December, 1870, used and are still using another method of determining by lot or chance the prizes in their said business, of the following character: In an oblong box are deposited ninety balls, each numbered from one to ninety; printed certificates of subscription are issued to purchasers, each certificate containing three rows of numbers, five in each row; the number of certificates are numbered from one to one hundred and ninety-two, inclusive, and the purchaser of the certificate selects any number of the certificate he desires; each certificate has different figures from every other certificate. The oblong box is revolved and a ball is thrown out; the box is again revolved and another ball thrown out, and so on successively until the numbers on the balls so thrown out correspond with all the numbers in one of the rows on some one of the certificates, and when this occurs, the holder of such is entitled to the prize designated, and thus awarded; and that in each and every instance in the casting of said lots, either by said roulette wheel and ball, or by the oblong box and balls as aforesaid, the same has been conducted fairly and in public, and the distribution of the awards so made and ascertained has been fairly made in public; and that the selection of said modes of determining the prizes and the distribution of the same, was made by your orators as the modes of lot or chance to determine the same, because these modes seemed best to your orators to promote the object of the first said act, and that the mode adopted as aforesaid by the use of the oblong box and balls, is upon the same principle as the game called keno is played or carried on.

14th. That, sometime after June, 1870, believing that they could carry on their said business without interruption, your orators again

9 commenced their said business, and carried it on in the manner and modes above stated, without interruption, until, on the 2nd day of August, 1871, your orator, the said I. C. Moses, was arrested by Thomas McPhillips, assistant chief of police of said city, on the same pretense of violating said ordnance of said city against exhibiting a gaming-table by your orators pursuing their said business in the manner

aforesaid; and, subsequent thereto, on or about the 11th day of August, 1871, your orator, the said I. C. Moses, was again arrested by one Sullivan, a member of the police force of said city, on the same pretense, that by carrying on the business of your orator in the manner last aforesaid, he was violating said ordinance of said city against exhibiting a gaming-table.

15th. That, about the 5th day of August, 1871, and subsequently, members of the police force of said city, also made arrests of various persons to the number of seven at least, and your orators believe to a greater number, who had purchased certificates of subscription from your orators, entitling them to the prizes which should be drawn by their numbers, as before set forth in the manner last aforesaid, on the same pretense as aforesaid, that said persons were violating said ordinance of said city, a copy of which is attached hereto as Exhibit No. 7.

16th. That, by reason of the said unlawful arrests, your orator, I. C. Moses, and the other persons arrested as aforesaid, in the month of August, 1871, have been put to great vexation and annoyance, and also to pecuniary expense, and in consequence thereof, also, the said business of your orators is almost entirely broken up; that these arrests have deterred and prevented many persons from purchasing certificates of subscription for prizes in the business of your orators, who otherwise would have done so, and after having gone to great expense in preparing for carrying on their said business permanently, and renting rooms for that purpose as aforesaid, they will, by the improper and illegal conduct of said members of the police force, be not only deprived of the profits which they otherwise would have derived from the same, but will be subjected to heavy losses.

17th. That neither the said McPhillips and the said Sullivan, who made said arrests of your orator, I. C. Moses, and the other members of the police of said city who made the other arrests, in August, 1871, as aforesaid, and none of them are able to respond in damages for the trespasses and damages done to your orators by their unlawful acts as aforesaid; and your orators charge, on information and belief, that neither of the said policemen has property to an amount greater than is exempted by law from sale under execution.

18th. That your orators are informed and believe, and so charge, on information and belief, that it is the common intention of all the members of the police force of said city to interfere, and your orators believe they will so interfere, with the said business of your orators, by successive and continued arrests of such persons as are engaged in carrying on said business, both your orators and their agents, and such persons as purchase certificates of subscription for prizes therein, and thereby to compel your orators to cease altogether to do business under the act of the legislature of the State first mentioned in this bill, in the city of Mobile, and thereby deprive your orators of the franchises and privileges purchased as aforesaid; and that the several members of said city police are unable to respond in damages for any injuries or losses sustained by your orators from any such improper or unlawful conduct on their part, and that they severally are not worth more property than is exempt by law from sale under execution, and that the police of said city, as they are informed and believe, and from that information and belief charge to be true, consists of about seventy-five persons, and their names are unknown to your orators.

19th. That, under the ordinances of said city of Mobile, the mayor thereof "shall be the head of the police department, and shall superintend and direct the police generally," and that the policemen "shall

be subject to his control in the discharge of their duties, and may, at any time, be removed by him for any misconduct or neglect of duty;" and Martin Horst is the mayor of said city.

20th. That, under the ordinances of said city of Mobile, the aldermen and common council may arrest, or cause to be arrested, all persons found violating or who may be reasonably suspected of having violated any ordinance of said city, and shall have the power to detain or order the detention of all such persons in custody in the city prison over night and over the sabbath and until such persons can be examined or tried by a competent court or magistrate, unless they give bond according to law.

21st. That, by an act of the legislature of this State, approved Nov. 17th, 1868, it is provided that, "on complaint being made in writing before any of the following-named municipal officers of the city of Mobile, to wit, the chief of police, the day sentinel, or the night sentinel, charging any person or persons with having violated any ordinance of said city, or with having committed a public offense within the limits of said city, it shall be lawful for such officer to administer an oath verifying such complaint, and upon such complaint being subscribed and verified by the complainant before such officer, it shall be lawful
12 for him to give any of the policemen of said city a warrant for the arrest of the person or persons so accused, returnable before the mayor of said city."

22d. That the said mayor, aldermen, and common councilmen of said city, the chief of police, the assistants to said chief of police, the day sentinel, and the night sentinel, in ordering such arrests of your orators and their assistants, engaged in carrying on their said business, or in ordering the arrests of persons purchasing certificates of subscription in your orators' said business as aforesaid, would not be liable to your orators for damages for the loss they would sustain by reason of ordering such arrests, inasmuch in such cases they would be exercising judicial power or power in its nature judicial, and in making such arrests themselves, if sued therefor for false imprisonment could and would allege that they had reasonable grounds for such arrests, and would thus be free from responsibi'ty for such arrests.

23rd. That, for the reasons aforesaid, your orators are remid'less at law and can have no adequate relief, save in a court of chancery and by the orders of this court, and unless your honor will interpose by proper orders made in this cause, your orators will be damaged to an extent and in a manner that cannot be estimated at law; that their business is of that character which depends upon the number of certificates of subscription purchased in their business, and it will be impossible to make any estimate thereof to any certainty by legal evidence, and for that reason no possible remedy at law can compensate them therefor, even if they could sustain action at law and recover damages for such interference and disturbance of their said business.

Wherefore they pray of your honor that the said Martin Horst, as mayor of said city, and the mayor, aldermen, and common council
13 of the city of Mobile; and that R. M. Quinn, chief of police of said city, Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistants chiefs of police of said city, and who all reside in said county of Mobile, be made parties defendants to this bill of complaint, and that they answer the same under the rules of practice in this court, according to the note at the foot thereof; and may it please your honor to grant to your orators a writ or writs of injunction, directed to said Martin Horst, as mayor aforesaid, enjoining and restrain-

ing each and every member of the police force of said city, through him, the said mayor, as the head thereof, from interfering with or disturbing your orators, in the carrying on of their said business, either in the use of the scheme of the roulette table and ball, or in the use of the scheme of the revolving oblong box and balls, on the principle of the game called keno; or in the sale of their said certificates of subscription in either of said schemes, or disturbing any of their agents employed in carrying on their said business on the plans of either of said schemes, either by arresting your orators or any of their said agents, on the charge or pretence of violating thereby, any ordinance of said city against gaming or against exhibiting a gaming-table, either for any past or future acts done by them or their said agents, in carrying on their said business as aforesaid, on the several schemes as aforesaid, or otherwise disturbing them therein; and that said defendants, and said police force through their said head, Martin Horst, as mayor of said city, be also enjoined and restrained from disturbing or interfering with any persons, who may have been, or may become the holders of certificates of subscription in either of said schemes, of said business of your orators, or for any past or future act as such holders of certificates in either of said schemes,
either by the arrest of any such person on a charge *on a charge* or
14 pretense of betting at a gaming-table, or a game of chance, or otherwise disturbing or preventing any person from becoming a holder or purchaser of any certificate of subscription, in either of said schemes of your orator's said business, until the further order of this court; and that said Martin Horst, as mayor as aforesaid, be enjoined and commanded by such orders, powers and authority as are at his command, as said head of the police force of said city, to prevent and restrain the said police force of said city from interfering with the said business of your orators on the plans of said several schemes, by arrests of your orators or their agents; or of persons holding or having held certificates of subscription therein, on any charge or pretense of violating the ordinances of said city, against exhibiting a gaming-table or game of chance, or in any other manner interfering with the said business of your orators, as carried on as aforesaid, on the plans of said several schemes, until the further order of this court; and that upon the final hearing of this cause, that your honor would perpetuate the said injunction, or grant such other relief as is meet and adequate in the premises.

And that your honor would grant to your orators a writ of subpœna from said court, directed to said Martin Horst, to the mayor, aldermen and common council of the city of Mobile; to R. M. Quinn, Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, commanding them, and each of them, to be and appear before your honor at the next term of the chancery court, to be held for the county of Mobile aforesaid, then and there to answer this bill, and to stand to, abide by and perform such final or further order and decree, as may be made by your honor in the premises.

O. J. SEMMES &
ELMORE & GUNTER,
Sol'rs for Compl'ts.

15 NOTE.—Each of the defendants are required to answer each of the paragraphs of the said bill of complaint; but an oath or affidavit to their answer is expressly waived.

O. J. SEMMES &
ELMORE & GUNTER,
Sol'rs for Compl'ts.

THE STATE OF ALABAMA, *Mobile County:*

Before me, John Elliott, judge of the 6th judicial circuit of the State of Alabama, personally appeared I. Clifton Moses, who, being sworn, on oath says that the matters and things stated in the foregoing bill of complaint are true as stated; that when stated as true they are true, and when stated otherwise, or on information and belief, he believes them to be true.

I. CLIFTON MOSES.

Sworn to and subscribed before me this the 17th day of August, 1871.

JOHN ELLIOTT,
Judge 6th Circuit, Ala.

Order granting injunction.

To the register in chancery of the first district of the southern chancery division of the State of Alabama:

Upon the complainants, I. Clifton Moses and Eugene Beebe, or either of them, giving bond with security in the sum of five thousand dollars, payable to and approved by you as such register, and conditioned to pay all damages which any person may sustain by the suing out of such injunction prayed for in the bill, if the same is dissolved, let an injunction issue according to the prayer of the bill.

JOHN ELLIOTT,
Judge 6th Circuit, Ala.

Filed August 17th, 1871.

JAMES GILLETTE,
Register.

16 EXHIBIT No. 1.

MOBILE, ALA., *Febr'y 2nd*, 1869.

This is to certify that I. C. Moses & Co., managers of the Mobile Charitable Association, have paid the board of school commissioners of Mobile County for the use of the public schools of said county, the sum of one thousand dollars, for the year 1869, in compliance with the provisions of an act to establish the Mobile Charitable Association, for the benefit of the common school-fund of Mobile County, without distinction of color.

C. A. BRADFORD,
Secretary.

EXHIBIT No. 2.

TUSCALOOSA, *Nov. 30th*, 1869.

Received of I. C. Moses & Co., proprietors of the Mobile Charitable Association, established by an act of the legislature of the 31st December, 1868, the sum of one thousand ($1,000.00) dollars, being the annual payment for the year 1870, required to be made by the said I. C. Moses & Co., to the undersigned, on behalf of the school commissioners of Mobile County.

(Signed) H. S. WHITFIELD,
Commissioner of Lotteries.

EXHIBIT No. 3.

MOBILE, *Janr'y 11th*, 1871.

Mr. I. C. MOSES.

SIR: You are hereby notified not to pay over any moneys in your hands due the school-fund of Mobile County to any person or persons except myself, as superintendent of education. For any violation of the above notice you will be held strictly responsible.

Very truly y'rs,

G. L. PUTNAM,
Supt. Ed., M. C.

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EXHIBIT No. 4.

THE STATE OF ALABAMA, *Mobile County:*

I. C. Moses & Co., have this day paid Edward R. Dickson, superintendent of education of Mobile County, one thousand dollars, that being the annual sum for the year 1871, or rather for the year beginning two years from the date of their first annual payment, for the use of the public schools of said county, under and in pursuance of "An act to establish the Mobile Charitable Association, for the benefit of the common-school fund of Mobile County, without distinction of color," approved Dec'r 31st, 1868. Said sum of one thousand dollars is paid in compliance with said act of the general assembly, and is accepted as such, and is made to said Dickson, superintendent as aforesaid, by order, authority, or assent of the board of school commissioners of said county, the apparent delay in making said payment of said one thousand dollars is fully explained by litigation, cross claims, notices, &c., &c., which are fully made known to said board; it is also proved to said board that the said first annual payment above referred to was made on the 2nd day of Febr'y, 1869.

April 19th, 1871.

E. R. DICKSON,
Supt. Ed., M. C.

EXHIBIT No. 5.

MOBILE, *April 25th*, 1871.

Messrs. I. C. MOSES & CO.

GENTLEMEN: I take pleasure in communicating to you the action of the board of school commissioners of Mobile County in reference to your prompt payment to them of the sum of $1,000.00, due the educational fund of said county as hereinafter specified, viz: At a meeting of

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the board of school commissioners of Mobile County, held April 24th, 1871, it was resolved that payment of one thousand dollars for the use of the public schools of Mobile County, made on the 19th day of April, 1871, by I. C. Moses & Co., under and in compliance with the act of the legislature of Alabama to establish the Mobile Charitable Association, approved Dec'r 31st, 1868, to E. R. Dickson, supt. of education for Mobile Co., and the receipt therefor given by said superintendent to said I. C. Moses & Co., dated April 19, 1871, be, and the same are hereby, approved by this board. Resolved that the thanks of the board be tendered to Messrs. I. C. Moses & Co., for their prompt compliance with the law and payment to the supt. of education of Mobile Co., of $1,000.00 due the educational fund of said county from the Charitable Association.

J. J. DELCHAMPS, *Sec'ty.*

EXHIBIT No. 6.

Gaming.

An ordinance respecting gaming.

100. That if any person shall keep or exhibit any gaming-table of any name or description whatever, or any faro-bank, or bank for gaming of any kind, by whatever name it may be called, or be concerned therein, directly or indirectly, he shall be fined such sum as the mayor may impose, not exceeding fifty dollars.

EXHIBIT No. 7.

99. Be it ordained, That no person shall play with cards or dice for money, or at any faro-bank or gaming-table, by whatever name, letter, or figure the same may be known or called, nor at any game of
19 chance, for money or other valuable thing, on the side or hands of such as do game, with dice or cards, or at any faro-bank, or at any gaming-table, under such penalty as the mayor may impose, not exceeding fifty dollars.

Filed Aug. 17th, 1871.

JAMES GILLETTE,
Register.

Injunction bond.

STATE OF ALABAMA, *Mobile County:*

Know all men by these presents that we, I. Clifton Moses, as principal, and Felix H. Aubert and G. B. Shawhan, as sureties, are held and firmly bound unto James Gillette, register in chancery for the first district of the southern chancery division in said State, and his successors in office, in the sum of five thousand dollars; for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this the 17th day of August, in the year of our Lord 1871.

The condition of the above obligation is such, that, whereas, the said I. Clifton Moses and Eugene Beebe have filed their bill of complaint, in the said first chancery district of said division of said State, against Martin Horst and others, and have therein prayed for an injunction directed to said Martin Horst, as mayor of the city of Mobile, enjoining and restraining each and every member of the police of said city, through him, the said mayor, as the head of said police force, from interfering with or disturbing said complainants in the carrying on their busi-
20 ness, either in the use of the scheme of the oblong revolving-box and balls, on the principle of the game called keno, or in the sale of certificates of subscription by said complainants, in either of said schemes, or in disturbing any of their agents employed in carrying on their said business, on the plans of either of said schemes, either by arresting complainants or any of their said agents, on the charge or pretense of violating thereby any ordinance of said city against gaming or against exhibiting a gaming-table, either for any past or future acts done by them or their said agents, in carrying on their said business, as aforesaid, on the several schemes, as aforesaid, or otherwise disturbing them therein; and that the defendants to said bill, Martin Horst,

and the mayor, aldermen, and common council of the city of Mobile, R. M. Quinn, Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, and the police force of said city, through their head, Martin Horst, as mayor of said city, be also enjoined and restrained from disturbing or interfering with any persons who have been or may become the holders of certificates of subscription in either of the said schemes of said business of complainants, or for any past or future act as such holders of certificates in either of said schemes, either by the arrest of any such persons, on a charge or pretense of betting at a gaming-table, or at a game of chance, or otherwise disturbing or preventing any person from becoming a holder or purchaser of any certificate of subscription in either of said schemes of the business of complainants; and also that said Martin Horst, as mayor of said city, be enjoined and commanded by such orders, powers, and authority as are at his command, as said head of the police force of said city, to prevent and restrain the said police force of said city from interfering with the said business of complainants, on the plans of the several schemes aforesaid, by
21 arrests of complainants, or their agents, or of persons holding or having held certificates of subscription therein, on any charge or pretense of violating the ordinances of said city against exhibiting a gaming-table, or against betting at a gaming-table, or game of chance, or in any other manner interfering with the said business of complainants, as carried on on the plans of said several schemes; and, whereas, the said complainants, on the 17th day of August, 1871, obtained from the Honorable John Elliott, judge of the sixth judicial circuit of said State, an order signed by said judge, and directed to the register of the chancery district of the southern chancery division of said State, commanding said register to issue the writs of injunction, as prayed in said bill upon the complainants, or either of them, giving bond with security in the sum of five thousand dollars, payable to and approved by said register, and conditioned to pay all damages which any person might sustain by the suing out of said injunction, as prayed for in said bill, if the same is dissolved:

Now, therefore, the conditions of this obligation is such, that if the obligors of this bond shall well and truly pay all damages which any person may sustain by the suing out of such injunction, as prayed for in said bill, if the same shall be dissolved, then this bond shall be void; but otherwise shall remain in full force and virtue.

The word "several" interlined, and the word "shall" stricken out before signing, sealing, and delivery.

I. CLIFTON MOSES. [SEAL.]
F. H. AUBERT. [SEAL.]
G. R. SHAWHAN. [SEAL.]

Taken, approved, and filed this 17th day of August, 1871.
JAMES GILLETTE, *Register.*

22 *Writ of injunction.*

THE STATE OF ALABAMA, *Mobile County:*

To any sheriff of the State of Alabama, greeting:

Whereas I. Clifton Moses and Eugene Beebe have exhibited in the chancery court of the first chancery district of the southern chancery of the State of Alabama, their bill of complaint against Martin Horst and others, and have therein prayed for an injunction, and obtained an

order therefor as hereinafter stated, from the Honorable John Elliott' on their or either of them giving bond, as required by said order; and, whereas, the said bond has been given; and, whereas, the said order is to enjoin and restrain each and every member of the police force of the city of Mobile, through Martin Horst, the mayor of said city, as the head of said police force, from interfering with or disturbing the said complainants, I. Clifton Moses and Eugene Beebe, in the carrying on of their business, either in the use of the scheme of the roulette table and ball, or in the use of the scheme of the oblong box and balls, on the principle of the game called "keno," or in the sale of the certificates of subscription by said complainants in either of said schemes, or disturbng any of their agents employed in carrying on the plans of either of said schemes, either by arresting complainants, or any of their said agents, on the charge or pretense of violating thereby any ordinance of said city against gaming or against exhibiting a gaming-table, either for any past or future acts done by them or their said agents, in carrying on their said business, as aforesaid, on the several schemes, as aforesaid, or otherwise disturbing them therein; and also, whereas, said order is also to enjoin and restrain the said Martin Horst, and the mayor, aldermen, and common council of the city of Mobile, and R. M. Quinn, Oliver Keeler, Thomas McPhillips, Lewis Kossens, and Jesse T. Cain, and the police force of said city, through their head, Martin Horst,
23 as mayor of said city from disturbing or interfering with any persons who have been or may become the holders of certificates of subscription in either of said schemes of said business of said complainant, or for any past or future act as such holders of certificates in either of said schemes, either by the arrest of any such person on a charge or pretense of betting at a gaming-table, or at a game of chance, or otherwise disturbing or preventing any person from becoming a holder or purchaser of any certificate of subscription in either of said schemes of the business of complainants; and whereas also said order is to enjoin and command the said Martin Horst, as the mayor of the said city, by such orders, powers, and authority as are at his command as the head of the police force of said city, to prevent and restrain the police force of said city from interfering with the said business of complainants on the plans of the several schemes aforesaid, by arrests of complainants, or their agents, or of persons holding or having held certificates of subscription therein on any charge or pretence of violating the ordinances of said city against exhibiting a gaming-table, or against betting at a gaming-table, or at a game of chance, or in any other manner interfering with the said business of complainants as carried on on the plans of said schemes until the further order of the court of chancery aforesaid:

Now, therefore, you will make known the premises to the said Martin Horst, and to the mayor, aldermen, and common council of the city of Mobile, and to R. M. Quinn, Oliver Keeler, Thomas McPhillips, Lewis Kossens, and Jesse T. Cain, by serving a copy hereof on each of said parties, and make return of this writ to the next term of said chancery court, with your endorsement thereon, showing how you have executed the same.

Witness James Gillette, register in chancery for the first chancery district of the southern chancery division of the State of Ala-
24 bama, and the seal of said court, at office in the city of Mobile, this the 17th day of August, A. D. 1871.

SEAL AND STATE TAX.] JAMES GILLETTE,
Register in Chancery.

Sheriff's return.

Rec'd August 17th, 1871, at four o'clock and 55 minutes p. m.; and, on the same day, at 5 o'clock p. m., I served a copy of the within injunction on R. M. Quinn, chief of police.

A. M. GRANGER, *Sh'ff M. C.*
By J. ESLAVA, *D. S.*

Also, on the same day, at five o'clock and fifteen minutes p. m., I served a copy of the same on John Maguire, president of the board of common council of the city of Mobile.

A. M. GRANGER,
Sh'ff Mobile Co.
By E. P. CHAPPELL, *D. S.*

On the 18th day of August, 1871, at two o'clock and 15 minutes p. m., I received copies of the injunction for the following-named persons, to wit: James M. Williams, pres't of the board of aldermen; Oliver Keeler, Thomas McPhillips, Jesse T. Cain, and Louis Kassins, assistant chiefs of police; and on the same day, at 5 o'clock p. m., I served a copy of the within injunction on James M. Williams, president of the board of aldermen; also, on the same day, at seven o'clock & 10 minutes p. m., I served copies of the within injunction on Jesse T. Cain and Louis Kassens, assistant chiefs of police; also, on the 21st day of August, 1871, at eight o'clock in the morning, I served a copy of the same on Thomas McPhillips, assistant chief of police.

A. M. GRANGER, *Sh'ff M. C.*
By JEROME ESLAVA, *D. S.*

On the 4th day of September, 1871, at eight o'clock and 25 minutes a. m., I served a copy of the within injunction on Martin Horst, mayor of the city of Mobile.

A. M. GRANGER, *Sh'ff M. C.*,
By E. P. CHAPPELL, *D. S.*

25 *Subpœna.*

THE STATE OF ALABAMA, *Mobile County:*

In chancery. First district, southern division.

To the mayor, aldermen, and common council of the city of Mobile, Martin Horst, mayor, R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kossens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, greeting:

We command you that within thirty days from the service of this writ of subpœna on you, you appear and plead to or answer a bill of complaint filed in our chancery court for the first district of the southern chancery division against you, defendants, by I. Clifton Moses and Eugene Beebe, complainants, (a copy of which bill of complaint will be furnished you by the register, if desired,) holden at the court-house of the county of Mobile, on the fourth Monday of January, A. D. 1872; and that you further do and observe what said court shall direct in this behalf, under the pains and penalties prescribed by law, and in such case made and provided.

Witness James Gillette, register of said court, at office, this 17th day of August, A. D. 1871.

Attest: JAMES GILLETTE, *Register.*

To any sheriff of said State, greeting:

We command you that you execute this process agreeably to law, and have the same, with your return thereon, at our next chancery court, to be held as aforesaid.

Witness my hand this 17th day of August, A. D. 1871.

Attest: JAMES GILLETTE, *Register.*

Sheriff's return.

Rec'd August 17th, 1871, at four o'clock & 55 minutes p. m.;
26 and, on the same day, I served a copy of the within subpœna in chancery on R. M. Quinn, chief of police.

A. M. GRANGER, *Sh'ff M. C.*,
By JEROME ESLAVA, *D. S.*

On the 17th day of August, 1871, I served a copy of the within subpœna in chancery on John Maguire, president of the board of common council of the city of Mobile.

A. M. GRANGER, *Sh'ff M. C.*,
By E. P. CHAPPELL, *D. S.*

And, on the 18th day of August, 1871, I served copies of the within subpœna in chancery on James M. Williams, president of the board of aldermen of Mobile City; Jesse T. Cain, Lewis Kossens, and Oliver Keeler, assistant chiefs of police; and, on the 21st day of August, 1871, I served a copy of the same on Thomas McPhillips.

A. M. GRANGER, *Sh'ff Mobile Co.*
B. J. ESLAVA, *D. S.*

And, on the 4th day of September, 1871, I served a copy of the within subpœna in chancery on Martin Horst, mayor of the city of Mobile.

A. M. GRANGER, *Sh'ff M. C.*,
By E. P. CHAPPELL, *D. S.*

Answer of city et al.

Answer & demurrer of 1. The mayor, aldermen, & common council of the city of Mobile, and Martin Horst, mayor.

THE STATE OF ALABAMA, *Mobile County:*

In chancery. First district, southern chancery division of the State of Alabama.

2. The answer of the mayor, aldermen, and common council of the city of Mobile, under the corporate seal of said city, to the bill of complaint of I. Clifton Moses and Eugene Beebe, filed in said court, against the said mayor, aldermen, and common council, and others, on the 17th day of August, 1871, the cause being numbered in said court
27 3222; respondents reserving all right of exception to said bill of complaint for answer thereto, or to so much thereof as they are advised it is material for them to answer, say:

3. They, on legal advice and opinion, say that, by virtue of an act of the legislature of Alabama, entitled "An act to establish the Mobile Charitable Association for the benefit of the common-school fund of

Mobile County, without distinction of color," approved December 31st, 1868, the legislature did not and could not grant to complainants and Frederic H. Fowler, and their associates, any such privileges as are claimed by complainants in their said bill of complaint; and these respondents now distinctly set up in this answer, and maintain that the said act is unconstitutional; that the privileges which the said act purports to grant are privileges which are not enjoyed by, and which it is not lawful for the citizens at large of the State of Alabama to enjoy; but that the citizens at large of the State of Alabama are, by the penal laws of the State of Alabama, expressly debarred from the enjoyment of said privileges, and the ordinances of the city of Mobile prohibit such enjoyment within said city, under penalties and punishment.

And respondents say, upon information and belief, that said complainants, claiming the exclusive privilege of keeping gaming-houses, have been actively engaged in prosecuting, in respondents' mayor's court, other citizens who have attempted to enjoy the same privileges, by keeping other keno-tables, to the end that complainants might suppress all competition in their gambling business and absorb the whole profits of their devices and gaming; and respondents insist that said act is unconstitutional upon other grounds, and insist that there never was any valid consideration for the same, moving from complainants or any one else to the State of Alabama.

28 4. Respondents admit that complainants and one Frederic H. Fowler formed themselves into an association, after the passage of said act, under the name of I. C. Moses & Co., in the city of Mobile, and begun the business of carrying on a lottery; but respondents distinctly deny that they did this under the provisions of and strictly in accordance with the terms of said act; and say that, on the contrary, they disregarded and failed to perform at the very outset the conditions imposed on them by said act, as the consideration thereof; and respondents insist that without the performance of said considerations, according to the terms of said act, no rights passed to complainants under said act, even if the said act were constitutional. Respondents say that complainants and their associates have not confined themselves to the business of carrying on a lottery, as contemplated by said act, but have abandoned the business of keeping and carrying on a lottery only, and have persistently and cunningly evaded the spirit, letter, and intent of said act, by various devices, and have set up, established, operated, kept, and carried on, in the city of Mobile, various devices which are not lotteries; and among them the device of roulette wheel and ball, and also the device known as keno, which are common gamblers' devices and gaming-tables and not lotteries, and which are other than and different in substance from the lottery-device first established by them as aforesaid; and respondents say that complainants, under pretence of cover by said act, have set up, kept, and maintained several gambling dens, in the city of Mobile, at various places, wherein the said gaming-table and device are kept, and at which the public is allowed and invited to game for money, greatly to the demoralization of the citizens of Alabama; and further, they say, on information, of the truth of which they have no doubt, that complainants permit minors

29 to game at said places and devices, and among others, have, within the last eight months permitted John Hiffler, George Fault, Robert Coleman, about eighteen years of age, James Arnold, about sixteen years of age; James Gormon, about fourteen or sixteen years of age; and John Marvin, who are all minors, under twenty one years of age, to bet and game at said devices in said establishments;

all of which is contrary to law and greatly to the demoralization of the people of Mobile, and others visiting said city, and contrary to the ordinances of the city of Mobile, copies of which ordinances are appended, as exhibits to complainants' bill. Said ordinances were duly passed and adopted and became law, in pursuance of and according to the charter of the city of Mobile, to which reference is made in the acts of the legislature of Alabama; and respondents aver, upon information and belief, that at least one of said minors, to wit, James Gormon, lost employment, and was discharged by his employers for playing at keno, because it made him neglect his business and destroyed his usefulness as an employee.

5. Respondents say that said act of the general assembly of Alabama required I. C. Moses and Eugene Beebe and Frederic H. Fowler, and their associates, to pay or cause to be paid to the board of school commissioners of Mobile County, for the use of the public schools of said county, the sum of one thousand dollars, before commencing business under said act, and annually thereafter a like amount, for the term of ten years, or so long as said partnership should choose to do business under the provisions of said act; it being recited in said act, that it was understood and agreed that if said payment of one thousand dollars per annum by said partnership to said common-school fund was the consideration upon which the "privilege" named in said act was granted,
30 and that, whenever the said company should fail to pay said sum according to the provisions act, then and in that case, their right to do business should cease; nevertheless, respondents say that, complainants, pretending to conform to said act, established themselves in the city of Mobile, under the name of I. C. Moses & Co., or Eugene Beebe & Co., designating themselves as the Mobile Charitable Association, and set up a lottery, according to a device, scheme, or plan described in Exhibits B, C, D, E, & F, hereto attached and made a part of this answer, sold certificates or lottery tickets therein, had drawings, awarded prizes, and regularly did business as a lottery as early as the 21st day of January, 1869, if not earlier; although, as appears by complainants' bill, they did not pay the one thousand dollars until the 2nd day of February, 1869, although the said act required them to pay said sum before commencing business.

And respondents insist that complainants forfeited all the privileges which said act purports to give them, by commencing business before making said payment. Respondents attach, as Exhibit A, which is made a part of this answer, a copy of an advertisement of said I. C. Moses & Co., in the issue of 22 January, 1869, of the Mobile Daily Register, a newspaper published in the city of Mobile, which advertisement is a report by complainants of their drawing in said lottery on the 21st day of January, 1869.

6. Respondents say that the second payment under said act became due and payable, on or before the 21st day of January, 1870, but respondents do not know, nor have any information, except from complainants' bill and exhibits, whether it was ever paid in accordance with the terms of said act, and require proof thereof.

7. Respondents say that the third payment of one thousand dollars, contemplated in said act, became due and payable, on or before
31 the 21st day of January, 1871, and that it was not then paid; that it was not paid until April 19th, 1871; and that after it became due and payable, and before it was paid, in the legislature of Alabama, on the 8th day of March, 1871, said act was repealed.

Respondents insist that the excuses set forth by complainants for their

failure to pay said third one thousand dollars, when due, are not valid excuses.

Respondents do not admit the allegations in paragraphs 5 & 6, in complainant's bill, in manner and form as therein stated, but say the facts are as follows: By virtue of An act of the legislature of Alabama, approved 31st December, 1868, entitled An act to regulate lotteries, the governor of Alabama, appointed H. S. Whitfield, commissioner of lotteries, but say that the power and authority of said Whitfield to collect and receive said money expired by the terms of said act, in two years from its date, to wit, on the 31st of December, 1870, so that, the authority and office of said Whitfield had expired before said third annual payment become due and payable. Said money was, therefore, payable to George L. Putnam or to W. T. Walthall, one or the other, as county superintendent of education for Mobile County. Said Putnam became such county superintendent, and duly qualified, and entered on his duties, on the 6th day of July, 1869, and on the 19th day of December, 1870, Joseph Hodgson, the superintendent of public instruction of the State of Alabama, undertook to remove said Putnam from said office of county superintendent of education for Mobile County, by an order, a copy of which is hereto appended, as Exhibit G, which is made a part of this answer. Said order was received by said Putnam, on the 24th day of December, 1870. About the same time said Hodgson appointed W. S. Walthall, county superintendent of education for Mobile County, in the place of said Putnam. Said Putnam denied
32 the authority of said Hodgson to remove him without a trial and conviction, and to appoint said Walthall in his place, and filed his bill of complaint in this court against said Walthall, Hodgson, and R. M. Reynolds, as auditor of the State of Alabama, on the 4th day of January, 1871, and obtained from the Hon'l John Elliott, judge of the 6th judicial circuit of Alabama, an interlocutory injunction, returnable into this chancery court, restraining and prohibiting the said Joseph Hodgson, as superintendent of public instruction of Alabama, from certifying to the auditor of the State in favor of said Walthall, as said county superintendent, for any amount of money in the *the* treasury of the State, appointed to the said county for school or educational purposes; and restraining and enjoining the said R. M. Reynolds, as auditor of the State, from drawing any warrant on the state treasurer for any money, in favor of said Walthall, on the certificate of said Hodgson, part of the annual apportionment of school moneys to said county of Mobile; and the chancellor of this honorable court, the Hon'l Adam C. Felden, on motion of defendants to dissolve said injunction, refused to dissolve the same, thereby deciding that the said Hodgson had no power to remove said Putnam from office, and the said Putnam did continue in fact to hold and exercise the duties of said office until the election and qualification of his successor, E. R. Dickson, on the 13th day of March, 1871, during which time said third payment of one thousand dollars became due and payable by complainants, to wit, on or before the 21st day of January 1871; nevertheless, complainants did not pay said money to said Putnam, as they well might have done, when it became due; and respondents say, upon information and belief, that the said Hodgson had no power to remove said Putnam as he had attempted to do. Respondents further say that it is true that said Putnam did, on the 11th day of January, 1871, notify said I. C. Moses & Co.
33 not to pay said third payment of one thousand dollars to said Walthall, or to any one but himself, as appears by Exhibit No.

3, to complainant's bill; but the said I. C. Moses & Co. did not pay it to said Putnam, as said notice in effect required them to do, although it was then past due.

Respondents, further answering, say that, after said sum became due and payable, and before it was paid, the legislature of Alabama, on the 8th of March, 1871, repealed the said act establishing said Mobile Charitable Association.

Respondents further say that it is true, that, at an election held on the 4th of March, 1871, E. R. Dickson, was elected county superintendent of education for Mobile County, in the place of said Putnam, and say that said Dickson gave bond and duly qualified as such superintendent, and entered on his duties without resistance from said Putnam, on the 13th day of March, 1871, and in fact exercised the authority and performed the duties of said office, and could and would have received from complainants, said third payment; nevertheless, complainants, not regarding the terms and provisions of the aforesaid act, neglected to pay said sum, and did not pay it until the 19th day of April, 1871, as appears by complainant's bill: And respondents insist that, by reason of said several failures to pay said several sums of money when due, and by reason of said act, complainants have no rights or privileges under said act, if indeed the legislature ever had the power to grant such privileges.

8. Respondents admit that said I. C. Moses & Co. obtained from the said Dickson the receipt, marked Exhibit No. 4, to their said bill, and from the board of school commissioners the paper, marked
34 Exhibit No. 5; but respondents deny that said Dickson or said board had any power or authority to pass upon or decide whether the defaults of said Moses & Co. were excusable, or to exempt them by certificate, receipt, or resolution, from the effects of such failure to pay, as required by said act establishing said miscalled Mobile Charitable Association. Respondents say, upon information and belief, that said I. Clifton Moses was very active, endeavoring to get said board to pass resolutions of fulsome flattery to him, or to said I. C. Moses & Co., for their promptness in paying said money; and that said Moses had a resolution already prepared to meet his views of what should be said complimentary of said I. C. Moses & Co., and presume that whatever whitewashing certificate, or complimentary notice, or resolution was given him, was given at his instance and solicitations. Respondents say that no consideration ever passed from the board of school commissioners of Mobile County, or from beneficiaries of said annual payments of one thousand dollars for the provisions in said act requiring said sums to be paid to them.

9. Respondents do not know, and are not informed, save by complainant's bill, whether I. C. Moses did or did not, purchase the interest of Frederic H. Fowler, in said business, on the 17th day of September, 1869, as alleged in paragraph 3, in their said bill, but deny that there was any interest which could be purchased on that date, because they insist that the privileges under said acts, if they ever existed, were lost by the failure of said persons to pay, as before set forth in this answer, and by reason of a departure from the provisions of the act in the
35 mode of conducting their business. And respondents know nothing of any expenditures made by complainants for rent, apparatus, and fixtures to carry on their said gambling business, as alleged in paragraph 7 of their said bill, but aver, on information and belief, that they have expended one hundred dollars or more in Mobile each month, for whisky and cigars, which are given away gratis to players in their

roulette and keno gambling-saloons according to the practice of gambling-houses.

10. Respondents deny that complainants ever carried on their said business in accordance with the terms of said act, and submit to the court whether the county superintendent of education of Mobile County was the only person authorized to receive from complainants the several annual payments aforesaid, or whether the said sums could have been paid to the board of school commissioners for said county.

11. Respondents admit that complainants, after carrying on said business as a lottery for some time, as already stated, did also adopt, set up, keep, and carry on a device known as the roulette wheel and ball. Respondents deny that said device, as adopted and used by complainants, is a lottery, or that they carried on the business of keeping it in accordance with the terms of said act establishing said Mobile Charitable Association, or that complainants adopted it in good faith as the device, lot, or chance which to them seemed best to promote and carry out the objects of said act; and respondents say that they adopted it as the device which to them seemed best to promote their own avaricious purposes and their own profit, without any regard either to the object and purposes of said act, or the benefit of the school-fund of Mobile County.

36 Respondents say that said device of roulette wheel and ball is not, truly speaking, a lot, or a distribution of awards, but that the same is a common gambler's game, well known by gamblers, and in use by them as a gaming-table in almost all the gambling-dens in Europe and America.

Respondents deny that complainants have conducted said device by the sale of certificates of subscription, which entitles the holders to such prizes as may be awarded, and say, upon information and belief, that they have often permitted persons to bet money directly at said device, according to the ordinary practice of gamblers, without any certificate of subscription or any pretext of such certificate.

Respondents admit and say that complainants have sometimes, for convenience in betting, sold to persons (gamblers) checks, of ivory or gutta-percha, about the size of a silver half-dollar, on one side of which the letter R is engraved, and on the other the words, "Mobile Charitable Association. Certificate. 25 cents (or other larger sums) entitles the holder to amount of prize, as per scheme. Nos. selected before drawing."

And under this flimsy device they pretend to call these gamblers' checks certificates of subscription. Respondents attach one of these checks, which is marked "R" on one side, as an exhibit and as a part of this answer. Respondents say that said checks are redeemable in money at the will of the holder, at the counter or gaming-table of complainants; that they are not numbered, and that any of them may be bet any time at said device; that they do not represent any particular drawing, but may be carried in the pockets of the holder for days, and used by him at any time to bet at said device; and that any one of said checks may be bet in a variety of manners at said device, at the pleasure of the holder. Said checks are sold by complainants for money,

37 and the winner at said device is sometimes paid in money, and sometimes in said checks; and respondents deny that only one set of certificates is sold by complainants for each game at said device, and that new certificates are sold for each game. Respondents deny that said checks are certificates in the sense of said act, and say that they are, in substance, only gambling-checks, and nothing more or less,

as are used by faro-dealers and other professional gamblers. Respondents attach one of these checks as an exhibit and part of this answer, marked R.

12. Respondents deny that said device and the mode of operating it is correctly described in complainants' bill. Said device, as used and operated by complainants, is, in substance, as follows, to wit: The device is known among gamblers as the "roulette wheel and ball and lay-out." The game is played on a table sometimes made expressly for the purpose, but it is frequently played on an ordinary table, oblong in shape, sometimes with a single and sometimes with a double "lay-out," so as to accom'odate a larger number of betters, and to have abundance of room, and a large number at play at the same time. The number of players is only limited by the inaccessibility of the table to the players by reason of the number of players, and as many can play at a time as get access to the table and room to put their money or checks on the spot, color, number, or figure they wish to bet on. There is a wheel, which is marked "A" on the drawing hereto attached as Exhibit H and made a part of this answer. This wheel varies in size from one foot to three feet in diameter, and it stands in a circular stationary frame which surrounds the wheel, and which is marked "B" on the drawing. The wheel is made independent of this frame, and revolves horizontally on a pivot on its own axis inside the frame, and the edges of the
38 wheel are divided into small cavities or cells, marked "C" on the drawing, large enough to receive an ordinary marble or ball. These cavities or cells are colored red, black, and green, as shown on said drawing, and have, besides, numbers, figures, or devices printed or painted over each of the cells. These devices, numbers, or figures are placed on or over these cells or cavities in an irregular manner, odd and even numbers alternating; the odd numbers, from one to twenty-seven, being on the black cells, and the even, from two to twenty-eight, being on the red cells. The three numbers, 29, 30, and 31, are on the green cells, or sometimes the characters 0, 00, and eagle are used instead of the numbers 29, 30, and 31. The above are all the numbers used in roulette. The rim of the frame which surrounds this wheel rises a little higher than the inside of this rim, facing towards the edge of the wheel; is concave or grooved, so that a marble or ball, having a given impetus, will revolve in this groove around the circle of the frame until its impetus is expended, when it will fall out of the gro've on the perimeter of the wheel, and settle into one of the cells of the wheel. The cloth on the table, or, as it is called, the "lay-out," is what the betting is done on. The wheel, frame, and ball determine the winnings or losses. This lay-out or cloth is divided into spaces, columns, numbers, figures, devices, and colors, as shown by the drawing, Exhibit H, aforesaid; the odd numbers being in black spaces, the even on red, and numbers 29, 30, 31, or 0, 00, and eagle on green field, thus corresponding with coloring, figures, devices, and numbers on the cells of the wheel. On the right of the lay-out, and adjoining the numbers 5 & 7, is a red field, and on the left, opposite the numbers 20 & 22, is a black field, and these two fields have no numbers, figure, or device on them.

39 The player bets in several ways, at his option, by placing on the lay-out money or checks, which he buys of the game-keeper, on the space, color, number, or device he wishes to bet on.

1st. He may bet that the red or black will be the result of the turn of the wheel. The game-keeper gives the wheel an impetus, which makes it revolve on its pivot in the frame. He gives the ball or marble an impetus and direction which makes it revolve in the gro've in

the frame, in an opposite direction from that given to the wheel. When the impetus of the ball is spent, it falls upon the revolving wheel, and settles into one of its cells in its perimeter, and the color, number, or device of that cell determines whatever the player has lost or won. If the color of the cell be red, and the player has bet on the right-hand red field, he wins an amount equal only to what he has bet; but if the cell be black or green into which the ball has fallen, the player loses. By this mode of betting the game-keeper risks only an amount equal to the player's bet, while the player has only fourteen chances out of thirty-one.

2nd. The player may bet, on any one of the four columns, that some number, in that column, will win, and the ball and wheel revolve again in the same way. If the player wins he gets three dollars for every dollar he has bet. The player having only seven chances out of thirty-one.

3rd. The player may bet on any one of the three numbers or characters on the green field, and, if successful, wins only eight dollars for one bet, while he has only three chances in thirty-one.

4th. The player can bet on the square made by any four of the adjoining numbered spaces, and if, successful, he wins six dollars for one bet, but has only four chances in thirty-one.

40 5th. The player may bet on any two adjoining numbers, and, if successful, wins twelve dollars for one bet, having two chances in thirty-one.

6th. The player may bet on any single number, and inexperienced players, or as they are called by gamblers, "green ones," generally bet in this way: The player, if successful, wins twenty-seven dollars for one bet, and has but one chance in thirty-one of winning.

Persons wishing to gamble at this game, buy of the game-keeper as many checks as they desire, and bet as many of them at a time as they choose, by placing them on the lay-out, and a player may bet in all the different ways at the same time; and, if a player should bet one dollar in every possible way at the same time, the result would necessarily be a loss to the player. When the player desires to stop playing, he can get money at the counter or table of the game-keeper for such checks as he may have on hand. The game-keeper has charge of the wheel and ball, and moves it at his pleasure, and the player's betting is against the game-keeper. Professional gamblers rarely bet against this game, as the chances are so largely against the player.

The "lay-out" may be painted on an oil-cloth, so as to be rolled up and carried easily in a valise or satchel, so as to be easily transported from place to place by hand; but often the device is substantially made, and the "lay-out" painted on a table ten feet 6 inches by about three feet 6 inches dimensions, with a double lay-out, one on each side of the wheel; and respondents say that the number of the hole in the wheel into which the ball happens to fall, does not designate the number of the pretended certificate which is entitled to a prize, as is alleged in said bill, but say that the color of the hole often

41 denotes what color on the table of the game-keeper wins; that is, whether red or black wins, without any regard to any number or to any particular check or certificate.

The said checks have no number on them, and when the number of the hole, in the wheel into which the ball falls, designates a winning number, it refers to the number printed or painted on the table of the gambler, which is bet upon, and not to any number on the certificate or check.

The game is conducted by the players placing the checks or money on the numbers or figures printed or painted on the game-keeper's table to designate which number, or figure, or color, the players bet on, and the falling of the ball into the hole in the wheel, determines which number, figure, or color on the table wins. There are no prizes awarded, but the winner is paid in money, or its representative in checks. When the ball falls and determines who has won or lost, the keeper of the device, rakes into his coffers all the money or checks which had been placed by players on other colors, numbers, or figures of the keeper's table other than that into which the ball has fallen, and pays the winner whose check or money was bet upon the winning color, figure, or number, on the table, according to the character of his bet.

Respondents say that said device is truly speaking not even an award by chance fairly made, because the said device is so cunningly contrived, and based upon, and constructed, on a calculation of chances so made and contrived, that while it is not impossible for a player to win occasionly by a rare good fortune, yet, according to all reasonable expectations, and, so far as nice calculation can make it probable, it is almost certain, if the player continues to play, he will shortly
42 lose, and that his losses will rapidly exceed his winnings, and the keeper of the device will as surely win; and the player's loss is the gain of the keeper of the table. Said device, as operated by complainants, has another distinct mark of a gaming-table, in this, that it requires only a minute or so, and perhaps less time even, for the ball to expend its force, so that the game is a rapid game, and a player may suffer an immense loss at it in a very short time. The player can also bet any number of checks, or any color, figure, or number on the keeper's table, or any number of said colors, figures, or numbers at the same time, and any number of players can bet on the same number, figure, or color; and, in many other respects, it is simply a gaming-device of the worst kind, such as was never contemplated by the legislature in said act. And said roulette is a common and old gambling-table, found at gamblers' dens, horse races, and other places where professional gambling is conducted. Respondents attach, as Exhibit H, and as a part of this answer, a description and drawing of said device, which respondents say, substantially illustrates the said device.

Respondents are advised that it is not necessary to answer specially the several recitals in complainants' bill of respondents' interfe'nce with them in the use of said device, inasmuch as respondents broadly admit that it is the purpose and determination of respondents, by and through its mayor, or acting mayor, its police force, detectives, and by the use of all its lawful powers, to utterly break-up and destroy complainants' said business, conducted by roulette and keno, and to suppress the same by arresting by its police force, under warrants, all persons whom the citizens of Alabama may accuse, under oath, of violating the laws
43 of the State and ordinances of the city against gaming, and against whom warrants of arrest may be issued, whether the offence be committed by complainants or others, and whether the offense be committed by the use of the roulette wheel and ball, or by the device of keno, or as it is styled in complainants' bill, the oblong box and ball. And in all cases in which persons so charged and under arrest may be brought before respondents (mayor's) court, or before respondents as mayor, or acting mayor, as ex-officio justice of the peace, they, as such officers, will exercise all the powers given them by law, either to convict the offenders, on proper evidence, of a breach of the ordinances of Mobile, and inflict fines and imprisonment, according to their jurisdiction or bind the

offenders over to answer to the city court of Mobile to such indictment as may be found by the grand jury of Mobile County, against them, but respondents will do no unlawful act. Respondents admit that its police, by respondents' instructions, have already, on more than one occasion, arrested players and game-keepers at said devices of roulette wheel and ball and keno of said I. C. Moses & Co. for gaming thereat, and has tried them before its mayor's court of Mobile, and that said court has convicted some, and acquitted others, against whom the evidence was insufficient; but respondents have never in anywise interfered with complainants' lottery-business, as herein first described, nor threatened to interfere with it; but respondents' say that it does propose to dispose of and break up complainant's business of roulette wheel and ball and keno. And respondents will, in all respects, endeavor to enforce the laws of the State and the ordinances of the city, that come under their judicial cognizance, and will endeavor to discharge their duties in this respect, but they cannot in advance undertake to say how they will decide cases and *and* questions brought before them, or what effect such decisions will have on complainants' business.

44

Respondents having answered as to what they have done, and will do, now deny having arrested persons lawfully engaged at playing at complainants' establishment, in manner and form as alleged by complainants in their said bill.

14. Respondents know nothing, and have no information as to the solvency or insolvency of its numerous policemen, nor what property they own, and requires full proof of the allegations of paragraph 12, of complainants' bill.

15. Respondents' also admit, that complainants, in addition to the said lottery-device and the device of the roulette wheel and ball, have also adopted, kept, maintained, and carried on in the city of Mobile, the device known as keno; said device of keno is not a lottery, nor do complainants conduct it as a lottery, but it is a common gamblers' device and gaming-table, nor was it adopted by complainants bona-fide for the purpose of promoting or carrying out the purposes and objects of said act establishing the Mobile Charitable Association, but for complainants' individual benefit and profit. It is not a lot or chance within the meaning of said act, nor is it a distribution of awards, nor do complainants make any distribution of awards thereby, but it is simply a gaming-device, and complainants have resorted to the flimsy subterfuge of calling the tools used in gaming thereat certificates of subscription. No certificates of subscription in the sense of said act are used by complainants in the use of said device. The device consists of an oblong box in which ninety balls or marbles are placed; these balls are respectively numbered from one to ninety. A number of cards similar to Exhibit K, hereto attached, are kept by the game-keeper for the use of the players; each of these cards has a large number near the centre, and the only use of this number is to enable the game-keeper to keep a record of the number of the card when taken by the player. The face of the card is divided off into three rows of nine small spaces, each about an inch square, and five spaces in each of these rows have a number printed in them, being one of the numbers from one to ninety; but the numbers are so combined on the various cards that no two cards are alike as to the arrangement of the said numbers. Complainants have pasted on the back of each a paper on which is printed the following words:

45

"Mobile Charitable Association for Educational Purposes. Authorized

by an act of the legislature Dec. 31st, 1868. Certificate of subscription for 50 cents. Amount of prizes to be governed by amounts announced or published before each drawing, as per scheme."

And complainants call this subterfuge a certificate of subscription. These cards are not sold at all, but the player pays fifty cents, twenty-five cents, or more or less, according to the announcement of the gambler keeping the table, for the use of cards for one game. and he may take one or more cards. The sum of the amounts so paid by the several players is the so-called pot for which the players play, less fifteen per cent. which the complainants take as game-keepers for their keeping the gaming-table; so that, in fact, the players each play against each other, and the winner wins from all the other players for himself and for the game-keeper; and the game-keeper, in fact, makes no distribution of awards, but merely holds the pot and pays it to the winner, less his percentage. The game is thus played: The box is revolved
46 and one ball is dropped out at a time, the keeper calls the number on the ball, and any player who has that number on any of the small spaces on his card covers it with a button. The player who covers five numbers in a line cries out "Keno," the revolutions of the box stops and his card is examined, and if he has kept his game correctly the money in the pot, less 15 per cent., is paid to him.

The game is a mere gambler's device to enable the players to game among themselves for a sum or pot made up by them, and the complainants charge fifteen per cent. of the winnings for the use of their table, devices, and services, absorbing the whole pot in six and two-thirds games.

Complainants sometimes pay the winner in money and sometimes in gaming-checks of ivory or gutta percha, similar to those described already in describing roulette wheel, except that the keno check has the letter "L" on it instead of the letter "R" which is on the roulette check.

Respondents attach one of these checks as an exhibit and part of this answer. These checks are convertible into money just as those used in the game of roulette are, and the players, respondents are informed and believe, may either pay money or checks for their use of the cards aforesaid, and the checks may be carried in the pocket and used at any time, and they are not sold for any particular game or drawing. The card does not belong to the player, but is surrendered to the game-keeper after every game, and these differ very materially from a certificate of subscription "sold." The game, like roulette, is a rapid game, and five minutes is a long time for any one game to be played. "Keno" is generally cried out by some player long before the ninety balls are all drawn from the box. The balls are drawn rapidly, and in no case can it take longer to play one game than it takes to draw all the ninety balls.

A game generally takes about a minute and a half to play it,
47 sometimes a little longer; and complainants usually continue to repeat games in immediate succession from dark to midnight, and often until later, often to 3 o'clock a. m., as respondents are informed and believe. Complainants have sometimes kept it up on Saturday night until after 12 o'clock, as affiant is informed and believes, and so states. Respondents also state, on information and belief, that complainants have, on Saturday night, sometimes closed their doors after twelve o'clock, but have still carried on the game secretly and in private, excluding the police from the premises, so that said business was not conducted in public as required by said act.

16. Respondents admit the arrests stated in complainants' bill, but deny that they were made in manner and form as therein stated, and

say that said arrests were made upon warrants of arrest duly issued by proper authorized officers, based upon affidavit charging said persons with offenses against the peace and dignity of the State of Alabama, and against the ordinances of the city of Mobile; that said arrests were properly made by proper officers, and that said persons were brought before the mayor's court of Mobile and tried, convicted, or acquitted by said court or put under bond to answer to the city court of Mobile to such indictment as might be found against them by the grand jury of Mobile County, according to the evidence adduced in said court in said cause; and respondents say that some of said persons have appealed from said decisions. Two of them have applied to the Hon'l. John Elliott, judge of the 6th judicial circuit, and obtained writs of habeas corpus, and, upon hearing of the same, one has been remanded by the said circuit judge to custody, and one put under his own recognizance to answer to the city court of Mobile, and neither of them has been discharged.

48 17. Respondents further say that complainants also filed a bill in equity in the circuit court of Mobile, and obtained an interlocutory injunction against the mayor, aldermen, and common council, the chief of police of Mobile City, and others, restraining them from interfering with complainants' device of roulette wheel and ball, and made an application to said judge for a rule against John Maguire, acting mayor of Mobile, and others, to show cause why they should not be attached for contempt of said circuit court in disregarding and violating said injunction; but that, upon the coming in of the answer to said rule, complainants abandoned said proceedings and filed their bill in this cause; and respondents state, upon information and belief, that it is the design of complainants to file bills, obtain interlocutory injunctions, and then dismiss their bills before a decision can be had, and to file new bills, obtain new interlocutory injunctions, and thus, by abuse of the process of the chancery courts, to continue their gambling aforesaid.

Respondents having fully answered so much of said bill as they are advised it is material for them to answer, now demur to said bill, and for cause of demurrer show:

1. That there is no equity in the said bill.

2. That said bill shows on its face that complainants have not complied with the terms and conditions upon which the privileges, which the said act of 31 December, 1868, purports to give them, granted.

3. That said act of December 31st, 1868, is repealed.

4. That said bill seeks to enjoin Martin Horst, as mayor of Mobile, and through him the police force of Mobile City, from the exercise of powers conferred on them by law.

49 5. That said bill in effect seeks to enjoin and restrain the mayor of Mobile, sitting in and holding and presiding over the mayor's court of Mobile, from exercising the quasi-criminal jurisdiction conferred on him by law.

7. That said bill seeks to enjoin and restain the mayor of Mobile from exercising the duties and authority conferred on him by law, ex-officio justice of the peace and magistrate.

8. That said bill seeks to enjoin a trespass.

9. That said bill shows that complainants have an adequate remedy at law.

10. That the chancery court has no jurisdiction of the case made by said bill.

R. H. & R. INGE SMITH AND
THO'S H. HERNDON,
Sol'rs for Def'ts.

THE STATE OF ALABAMA,
Mobile County:

Before me, James Gillette, register in chancery, comes John Maguire, acting mayor of Mobile, who is known to me, and being sworn, says he has read the foregoing answer, and that the allegations thereof, so far as made of his own knowledge, are true, and so far as made on information and belief, he believes them to be true.

[SEAL, CITY OF MOBILE] JOHN MAGUIRE,
Ex-officio Mayor.

Subscribed and sworn to before me this 1st day of Sept., 1871.
JAMES GILLETTE,
Register in Chancery.

50 EXHIBIT A.

MOBILE CHARITABLE ASS'N FOR EDUCATIONAL PURPOSES.
I. C. MOSES & CO., *Managers.*

Office under Battle House.

Official drawings. Supplementary.

Lottery. CLASS 1.—*Morning.*

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
70	12	17	45	72	12	44	59	13	17	74	67	58		

CLASS 2.—*Evening.*

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
51	18	17	45	72	12	44	59	13	17	74	67	58		

Witness our hands at Mobile, Ala., this 21st day of January, 1869.
P. N. MURPHY,
W. N. WEEKS,
Sworn Commissioners.

Published in the morning edition of Mobile Daily Register, Friday, 22nd day of Jan'ry, 1869.

EXHIBIT B.

Description of lottery established by I. C. Moses & Co., Jan'ry 21st, 1869, at Mobile, Ala.

Printed tickets, with numbers from 1 to 78, inclusive, are each placed in a small tin tube. The tickets were on white paper, about one inch length of figure. When the 78 numbers are in the 78 tubes all the tubes are placed in a large wheel. The apurture in the wheel is closed and the wheel given sundry revolutions at the option of the sworn commissioner; then a lad, blindfolded, takes from the wheel one of the tin tubes, and

the sworn commissioner holds the number up to public and calls out in a loud tone. This is repeated for eleven up to fifteen times, in accord with the character of the drawing, placing the numbers in rotation as they are called under the numerals from one to eleven or fifteen; for instance, in 11 No. scheme:

1	2	3	4	5	6	7	8	9	10	11
78	75	72	71	68	65	15	3	2	1	8

51 These numbers win in accord with the rule set out and herewith appended, and this is the plan adopted by all the lotteries now in vogue in this city. It is impossible to give the computation of chances against the player, but it is estimated that during a month a lottery has paid out about fifty per cent. of the aggregate receipts, leaving fifty per cent. for profit and expenses.

MOBILE, ALA., *August 25th*, 1871.

EXHIBIT C.

Mobile Charitable Association for educational purposes.

Combination scheme.—Supplementary lottery.

I. C. MOSES & CO., *Managers.*

Cost at	
$100..	$10 00
50...	5 00
25...	2 00
10...	1 00
5...	50

Any 5 numbers combined makes 10 three-number tickets.
3 out makes 1 three-No. tickets.
4 do. 4 do.
5 do. 10 do.

Cost at	
$100..	$20 00
50..	10 00
25..	5 00
10..	2 00
5..	1 00

Any 6 numbers combined makes 20 three-number tickets.
3 out makes 1 three-No. ticket.
4 do. 4 do.
5 do. 10 do.
6 do. 20 do.

Cost at	
$100..	$35 00
50..	17 00
25..	8 75
10..	3 50
5..	1 75

Any 7 numbers combined makes 35 three-number tickets.
3 out makes 1 three-No. ticket.
4 do. 4 do.
5 do. 10 do.
6 do. 20 do.
7 do. 35 do.

Cost at	
$100..	$56 00
50..	28 00
25..	14 00
10..	5 60
5..	2 80

Any 8 numbers combined makes 56 three-number tickets.
3 out makes 1 three-No. ticket.
4 do. 4 do.
5 do. 10 do.
6 do. 20 do.
7 do. 35 do.
8 do. 56 do.

Cost at	
$100..	$84 00
50..	42 00
25..	21 00
10..	8 40
5..	4 20

Any 9 numbers combined makes 84 three-number tickets.
3 out makes 1 three-No. ticket.
4 do 4 do.
5 do. 10 do.
6 do. 20 do.
7 do. 35 do.
8 do. 56 do.
9 do. 84 do.

Cost at		Any 10 numbers combined makes 120 three-number tickets.			
$100.	$120 00	3	out makes	1	three-No. ticket.
50.	60 00	4	do.	4	do.
25.	30 00	5	do.	10	do.
10.	12 00	6	do.	20	do
5.	6 00	7	do.	25	do.
		8	do.	56	do.
		9	do.	84	do.
		10	do.	120	do.

Cost at		Any 11 numbers combined makes 165 three-number ticket.			
$100.	$165 00	3	out makes	1	three-No. ticket.
50.	82 50	4	do.	4	do.
25.	41 25	5	do.	10	do.
10.	16 50	6	do.	20	do.
5.	8 25	7	do.	35	do.
		8	do.	56	do.
		9	do.	84	do.
		10	do.	120	do.
		11	do.	165	do.

Cost at		Any 12 numbers combined make 220 three-number tickets.			
$100.	$220 00	3	out makes	1	three-No. ticket.
50	100 00	4	do.	4	do.
25.	55 00	5	do.	10	do.
10.	22 00	6	do.	20	do.
5.	11 00	7	do.	35	do.
		8	do.	56	do.
		9	do.	84	do.
		10	do.	120	do.
		11	do.	165	do.
		12	do.	220	do.

Cost at		Any 13 numbers combined makes 286 three-number tickets.			
$100.	$286 00	3	out makes	1	three-No. ticket.
50.	143 00	4	do.	4	do.
25.	71 50	5	do.	10	do.
10.	28 60	6	do.	20	do.
5	14 30	7	do.	35	do.
		8	do.	56	do.
		9	do.	84	do.
		10	do.	120	do.
		11	do.	165	do.
		12	do.	220	do.
		13	do.	286	do.

Cost at		Any 14 numbers combined makes 364 three-number tickets.			
$100.	$364 00	3	out makes	1	three-No. ticket.
50	182 00	4	do.	4	do.
25.	91 00	5	do.	10	do.
10.	36 40	6	do.	20	do.
5.	18 20	7	do.	35	do.
		8	do.	56	do.
		9	do.	84	do.
		10	do.	120	do.
		11	do.	165	do.
		12	do.	220	do.
		13	do.	286	do.
		14	do.	364	do.

52

EXHIBIT D.

The following is a copy of one of the lottery tickets issued by complainants.

MOBILE CHARITABLE ASSOCIATION FOR EDUCATIONAL PURPOSES.

Authorized by an act of the legislature Dec. 31st, 1868.

Amount of prizes to be governed by printed rates.

Certificate of subscription.

Date	No.	Class
5.	11.	55.

1 of 6.25.

Purchasers of certificates must compare their numbers with those entered on the books, as the managers, I. C. Moses & Co., of the association are only responsible for those entered on books as returned to them in respective classes. Certificates to be governed by drawing of place where purchased.

O. K., *Agent.*

EXHIBIT E.

The following is a statement of the rates of charges of complainants in their lottery:

Ballots.	A certificate of single number, prize of—	A certificate of two number, prize of—	A certificate of three numbers, guaranteed, prize of—	A certificate of three numbers, not guaranteed, prize of—	A certificate of four numbers, guaranteed, prize of—	A certificate of four numbers, not guaranteed, prize of—
Agreed rates of all lotteries July 1st, '69. 78 11	5 for 1	$32	2 for $200	$225	20—$400	$700
78 12	5 for 1	24	2 for 125	150	15— 340	600
78 13	4 for 1	20	2 for 120	150	15— 340	400
78 14	4 for 1	16	2 for 100	120	15— 200	300
78 15	4 for 1	15	2 for 80	100	15— 150	250

$50 for $1 on stations in all 78 lotteries.

53 EXHIBIT F.

The following is one of the complainants' statements of the result of one of their lottery-drawings:

Official distribution of awards made by Mobile Charitable Association for Educational Purposes, in accordance with an act of the legislature approved Dec. 31st, 1868.

E. C. MOSES & CO., *Contractors, 14 North Royal Street, next to Battle House.*

SUPPLEMENTARY SCHEME.

CLASS 934. *Evening, June 29, 1871.*

1st.	2d.	3d.	4th.	5th.	6th.	7th.	8th.	9th.	10th.	11th.	12th.	13th.	14th.	15th.
75	5	16	9	31	60	63	69	8	43	29	48			

NUMERICALLY.

5	8	9	16	29	30	43	48	60	63	69	75			

Witness my hand at Mobile this 29th day of June, 1871.

P. N. MURPHY,
Sworn Commissioner.

(Tribune print.)

EXHIBIT G.

OFFICE SUPERINTENDENT PUBLIC INSTRUCTION,
Montgomery, Dec'r 19th, 1870.

Mr. GEORGE L. PUTNAM,
Superintendent of Education for Mobile Co.

SIR: By virtue of the powers vested in me by law, I hereby suspend you from the exercise of the office of superintendent of education for Mobile County, until your case can be investigated at the next meeting of the board of education. You are suspended for malfeasance in office, as shown by the report of the senate judiciary committee at the late session of the general assembly. You will transfer all monies, papers, and other property pertaining to the office of county superintendent of education to your successor.

54

I am, sir, &c.,

(Signed) JOSEPH HODGSON,
Superintendent of Public Instruction.

Wherefore respondents pray to be hence dismissed with their costs.

R. H. & R. INGE SMITH AND
T. HERNDON, *Sol's for Def'ts.*

Filed Sept. 1st, 1871.

JAMES GILLETTE, *Register.*

Notice of motion to dissolve.

In chancery court, first district, southern chancery division of the State of Alabama.

I. CLIFTON MOSES & EUGENE BEEBE, PARTNERS composing I. C. Moses & Co.,
vs.
THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile; Martin Horst, mayor of Mobile; R. M. Quinn, chief of police, & Oliver Keeler, Tho's McPhillips, Lewis Kassens, & Jesse T. Cain, assistant chiefs of police, of the city of Mobile.

Notice of motion to dissolve.

To Messrs. I. Clifton Moses & Eugene Beebe, partners, composing the firm of I. C. Moses & Co.

GENTLEMEN: Please take notice that, on Friday, the 27th day of October, the defendants in the above-entitled cause will make a motion before the Honorable Adam C. Felder, chancellor of the southern chancery division of the State of Alabama, at the court-house of Montgomery County, in the city of Montgomery, State of Alabama, to dissolve the injunction in the above-entitled cause. A copy of the motion is hereto appended and served herewith.

R. H. & R. INGE SMITH, AND
THO'S H. HERNDON,
Sol's for Def'ts.

Motion to dissolve injunction.

In chancery, first district, southern chancery division of the State of Alabama.

I. CLIFTON MOSES AND EUGENE BEEBE, PARTNERS composing I. C. Moses & Co.,
vs.
THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile; Martin Horst, mayor of Mobile; R. M. Quinn, chief of police, et al.

Motion to dissolve inj'n.

61 In the above-entitled cause the defendants move to dismiss the injunction heretofore granted, upon the denials in the answer and upon the demurrers filed, and for want of equity in the bill.

Oct. 17th, 1871.

R. H. & R. INGE SMITH, &
THO'S H. HERNDON,
Sol's for Def'ts.

Filed Oct. 17th, 1871.

JA'S GILLETTE, *Register.*

Cost at		Any 10 numbers combined makes 120 three-number tickets.		
$100.	$120 00	3 out	makes 1	three-No. ticket.
50.	60 00	4	do. 4	do.
25.	30 00	5	do. 10	do.
10.	12 00	6	do. 20	do
5.	6 00	7	do. 25	do.
		8	do. 56	do.
		9	do. 84	do.
		10	do. 120	do.

Cost at		Any 11 numbers combined makes 165 three-number ticket.		
$100.	$165 00	3 out	makes 1	three-No. ticket.
50.	82 50	4	do. 4	do.
25.	41 25	5	do. 10	do.
10.	16 50	6	do. 20	do.
5.	8 25	7	do. 35	do.
		8	do. 56	do.
		9	do. 84	do.
		10	do. 120	do.
		11	do. 165	do.

Cost at		Any 12 numbers combined make 220 three-number tickets.		
$100.	$220 00	3 out	makes 1	three-No. ticket.
50	100 00	4	do. 4	do.
25.	55 00	5	do. 10	do.
10.	22 00	6	do. 20	do.
5.	11 00	7	do. 35	do.
		8	do. 56	do.
		9	do. 84	do.
		10	do. 120	do.
		11	do. 165	do.
		12	do. 220	do.

Cost at		Any 13 numbers combined makes 286 three-number tickets.		
$100.	$286 00	3 out	makes 1	three-No. ticket.
50.	143 00	4	do. 4	do.
25.	71 50	5	do. 10	do.
10.	28 60	6	do. 20	do.
5	14 30	7	do. 35	do.
		8	do. 56	do.
		9	do. 84	do.
		10	do. 120	do.
		11	do. 165	do.
		12	do. 220	do.
		13	do. 286	do.

Cost at		Any 14 numbers combined makes 364 three-number tickets.		
$100.	$364 00	3 out	makes 1	three-No. ticket.
50	182 00	4	do. 4	do.
25.	91 00	5	do. 10	do.
10.	36 40	6	do. 20	do.
5.	18 20	7	do. 35	do.
		8	do. 56	do.
		9	do. 84	do.
		10	do. 120	do.
		11	do. 165	do.
		12	do. 220	do.
		13	do. 286	do.
		14	do. 364	do.

52 · EXHIBIT D.

The following is a copy of one of the lottery tickets issued by complainants.

MOBILE CHARITABLE ASSOCIATION FOR EDUCATIONAL PURPOSES.

Authorized by an act of the legislature Dec. 31st, 1868.

Amount of prizes to be governed by printed rates.

Certificate of subscription.

Date	No.	Class
5.	11.	55.

1 of 6.25.

Purchasers of certificates must compare their numbers with those entered on the books, as the managers, I. C. Moses & Co., of the association are only responsible for those entered on books as returned to them in respective classes. Certificates to be governed by drawing of place where purchased.

O. K., *Agent.*

EXHIBIT E.

The following is a statement of the rates of charges of complainants in their lottery:

Ballots.		A certificate of single number, prize of—	A certificate of two number, prize of—	A certificate of three numbers, guaranteed, prize of—	A certificate of three numbers, not guaranteed, prize of—	A certificate of four numbers, guaranteed, prize of—	A certificate of four numbers, not guaranteed, prize of—
Agreed rates of all lotteries July 1st, '69.	78 11	5 for 1	$32	2 for $200	$225	20—$400	$700
	78 12	5 for 1	24	2 for 125	150	15— 340	600
	78 13	4 for 1	20	2 for 120	150	15— 340	400
	78 14	4 for 1	16	2 for 100	120	15— 200	300
	78 15	4 for 1	15	2 for 80	100	15— 150	250

$50 for $1 on stations in all 78 lotteries.

53 EXHIBIT F.

The following is one of the complainants' statements of the result of one of their lottery-drawings:

Official distribution of awards made by Mobile Charitable Association for Educational Purposes, in accordance with an act of the legislature approved Dec. 31st, 1868.

E. C. MOSES & CO., *Contractors, 14 North Royal Street, next to Battle House.*

SUPPLEMENTARY SCHEME.

CLASS 934. *Evening, June* 29, 1871.

1st.	2d.	3d.	4th.	5th.	6th.	7th.	8th.	9th.	10th.	11th.	12th.	13th.	14th.	15th.
75	5	16	9	31	60	63	69	8	43	29	48			

NUMERICALLY.

5	8	9	16	29	30	43	48	60	63	69	75			

Witness my hand at Mobile this 29th day of June, 1871.

P. N. MURPHY,
Sworn Commissioner.

(Tribune print.)

EXHIBIT G.

OFFICE SUPERINTENDENT PUBLIC INSTRUCTION,
Montgomery, Dec'r 19th, 1870.

Mr. GEORGE L. PUTNAM,
Superintendent of Education for Mobile Co.

SIR: By virtue of the powers vested in me by law, I hereby suspend you from the exercise of the office of superintendent of education for Mobile County, until your case can be investigated at the next meeting of the board of education. You are suspended for malfeasance in office, as shown by the report of the senate judiciary committee at the late session of the general assembly. You will transfer all monies, papers, and other property pertaining to the office of county superintendent of education to your successor.

54

I am, sir, &c.,

(Signed) JOSEPH HODGSON,
Superintendent of Public Instruction.

Wherefore respondents pray to be hence dismissed with their costs.

R. H. & R. INGE SMITH AND
T. HERNDON, *Sol's for Def'ts.*

Filed Sept. 1st, 1871.

JAMES GILLETTE, *Register.*

Notice of motion to dissolve.

In chancery court, first district, southern chancery division of the State of Alabama.

I. CLIFTON MOSES & EUGENE BEEBE, partners composing I. C. Moses & Co., *vs.* THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile; Martin Horst, mayor of Mobile; R. M. Quinn, chief of police, & Oliver Keeler, Tho's McPhillips, Lewis Kassens, & Jesse T. Cain, assistant chiefs of police, of the city of Mobile.	Notice of motion to dissolve.

To Messrs. I. Clifton Moses & Eugene Beebe, partners, composing the firm of I. C. Moses & Co.

GENTLEMEN: Please take notice that, on Friday, the 27th day of October, the defendants in the above-entitled cause will make a motion before the Honorable Adam C. Felder, chancellor of the southern chancery division of the State of Alabama, at the court-house of Montgomery County, in the city of Montgomery, State of Alabama, to dissolve the injunction in the above-entitled cause. A copy of the motion is hereto appended and served herewith.

R. H. & R. INGE SMITH, AND
THO'S H. HERNDON,
Sol's for Def'ts.

Motion to dissolve injunction.

In chancery, first district, southern chancery division of the State of Alabama.

I. CLIFTON MOSES AND EUGENE BEEBE, partners composing I. C. Moses & Co., *vs.* THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile; Martin Horst, mayor of Mobile; R. M. Quinn, chief of police, et al.	Motion to dissolve inj'n.

61 In the above-entitled cause the defendants move to dismiss the injunction heretofore granted, upon the denials in the answer and upon the demurrers filed, and for want of equity in the bill.

Oct. 17th, 1871.

R. H. & R. INGE SMITH, &
THO'S H. HERNDON,
Sol's for Def'ts.

Filed Oct. 17th, 1871.

JA'S GILLETTE, *Register.*

Sheriff's return.

Rec'd Oct. 17th, 1871, and on the same day I served a copy of the within motion, and also a copy of the within notice on Oliver J. Semmes, esq'r.

A. M. GRANGER, *S. M. C.*
By M. V. B. CAREY, *D. S.*

Decree overruling motion.

AT CHAMBERS, IN VACATION,
Montgomery, Ala., November 17th, 1871.

On this day the following decree was made by the chancellor of the court of chancery, held at Mobile, for the first district of the southern chancery division of the State of Alabama, in this cause, to wit:

In chancery at Mobile, first district, southern chancery division of the State of Alabama.

I. CLIFTON MOSES ET AL.
vs.
THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, et al.

This cause was heard on Monday, the 30th day of October, 1871, in vacation, by consent of the parties, on a motion by the defendants to dissolve the injunction heretofore granted in said cause, on the grounds set forth in said motion, to wit, upon the denials of the answers and the demurrers filed and for want of equity, and which was argued by counsel on both sides; and on consideration, it is ordered and decreed, that the said motion be overruled, and that the defendants pay the costs of said motion, to be taxed by the register of this court, for which let execution issue.

Nov. 17th, 1871.

ADAM C. FELDER,
Chancellor.

Received from chancellor and filed Nov. 20th, 1871.
JA'S GILLETTE, *Register.*

62 *Motion for appeal.*

In chancery, at Mobile, Nov. 20th, 1871.

I. C. MOSES & EUGENE BEEBE
vs.
THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, et al. } Motion for appeal.

In this cause the defendants move for an appeal from the decree of the chancellor, rendered by the chancellor at chambers, on the 17th day of November, 1871, refusing to dissolve the injunction.

SMITHS, *Sol's for Def'ts.*

(Written across the face:)
Granted at rules, register's office, Nov. 20th, 1871.
JAMES GILLETTE, *Register.*

Order granting appeal.

AT RULES, REGISTER'S OFFICE,
Mobile, Nov. 20th, 1871.

This being a regular rule-day of the court of chancery aforesaid, the following order was made by the register of said court, in this cause, to wit:

I. C. MOSES & EUGENE BEEBE
vs.
THE MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, et al.

AT RULES, REGISTER'S OFFICE,
Mobile, Nov. 20, 1871,

In this cause, defendants, by their solicitors, move the register for an appeal from the decree of the chancellor, rendered in vacation, Nov. 17th, 1871, returnable to the January term, A. D. 1872, of the supreme court of the State of Alabama.

It is therefore ordered that an appeal as prayed for be granted upon defendants giving bond in the sum of two hundred and fifty dollars ($250.00) security, to be approved by the register, and conditioned to prosecute to effect such appeal and to abide by such decree as the supreme court may render in the premises.

JAMES GILLETTE, *Register.*

Appeal bond.

THE STATE OF ALABAMA, *Mobile County:*

Know all men by these presents that we, the Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips,
63 Lewis Kassens, and Jesse T. Cain, assistant chiefs of police, of said city of Mobile, as principals, and John Maguire and Almon M. Granger, their sureties, are held and firmly bound unto I. C. Moses & Eugene Beebe, their heirs, executors, and administrators, in the sum of two hundred and fifty dollars; for the payment of which we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 20th day of November, 1871.

The condition of the above obligation is such, that whereas, the above-bounden Mayor, Aldermen, & Common Council of the City of Mobile, have this day applied for and obtained an appeal, returnable to the January term, A. D. 1872, of the supreme court of Alabama, to suspend and reverse a decree recovered by said I. C. Moses & Eugene Beebe, against the said Mayor, Aldermen, and Common Council of the City of Mobile, et al., before the Honorable Adam C. Felder, chancellor of the court of chancery for the first district of the southern chancery division of said State, at chambers, in vacation, on the 17th day of November, A. D. 1871.

Now, if the said Mayor, Aldermen, & Common Council of the City of Mobile, shall prosecute the said appeal to effect, and satisfy such decree as the supreme court may render in the premises, then this obligation to be null and void; otherwise to be and remain in full force and effect.

JOHN MAGUIRE, [L. S.]
Ex-Officio Mayor of Mobile.
JOHN MAGUIRE. [L. S.]
ALMON M. GRANGER. [L. S.]

Approved and filed this 20th day of November, 1871.
JAMES GILLETTE, *Register.*

Citation.

THE STATE OF ALABAMA:

Court of chancery for the first district of the southern chancery division of said State, at Mobile.

64 To the sheriff of Montgomery County, greeting:

Whereas, at chambers, in vacation, on the 17th day of November, 1871, in a certain cause in said court, wherein I. C. Moses & Eugene Beebe, are complainants, and The Mayor, Aldermen, and Common Council of the City of Mobile, and others, are defendants, a decree was rendered against said defendants, on a motion to dissolve the injunction; to reverse which the said Mayor, Aldermen, and Common Council of the City of Mobile, on behalf of themselves and the other defendants, applied for and obtained from this office, an appeal, returnable to the next term of our supreme court of the State of Alabama, to be held at Montgomery, on the first Monday of January next, and the necessary bond having been given by the said Mayor, Aldermen, & Common Council of the City of Mobile, with John Maguire and Almon M. Granger sureties thereon:

Now you are hereby commanded, without delay, to cite the said I. C. Moses and Eugene Beebe, or Messrs. O. J. Semmes, and Elmore & Gunter, their solicitors, to appear at the next term of our said supreme court, to defend against said appeal if they think proper.

Witness James Gillette, register of the said court of chancery, this 28th day of November, 1871.

JAMES GILLETTE,
Register 1st Dist. So. Ch'y Div. at Mobile.

Sheriff's return.

Rec'd in office, Dec. 2nd, 1871.

PAUL STROBACH, *Sh'ff.*

Executed by serving copies on Elmore and Gunter, and O. J. Semmes, Dec. 2nd, 1871.

PAUL STROBACH, *Sh'ff.*

65 *Certificate of register.*

In chancery, at Mobile.

THE STATE OF ALABAMA,
First District, Southern Chancery Division:

I, James Gillette, register of the court of chancery, at Mobile, for the district and division aforesaid, hereby certify that the foregoing seventy-two and a half (72½) pages, contain a full, true, and correct transcript of the record and proceedings had in a certain cause, heretofore pending in said court, wherein I. Clifton Moses & Eugene Beebe are complainants, and The Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler,

Thomas McPhillips; Lewis Kassens and Jesse T. Cain, assistant chiefs of police, of Mobile City, are defendants, as the same appears from the record of said court.

Witness James Gillette, register of said court of chancery, and the seal thereof, this the 26th day of December, A. D. 1871.

CHAN. C'T 1ST DIST. SOUTHERN DIV.

JAMES GILLETTE,
Register.

Assignment of errors in supreme court of Ala.

In the supreme court of Ala., January term, 1872.

THE MAYOR, ALDERMEN, AND COMMON COUNCIL of Mobile, et al., appellants,
vs.
I. CLIFTON MOSES & EUGENE BEEBE, APPELLEES.

Assignm'nt of errors in sup. c't.

Said Mayor, Aldermen, and Common Council, come by attorney and say that, in the record and proceedings in said cause, the chancellor erred in refusing to dissolve the injunction.

R. H. & R. I. SMITH,
Sol's for Appellants.

66 *Caption.*

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and held according to law at the capitol, in the city of Montgomery, on the first Monday of January, A. D. 1872, being the 1st day of said month.

Present and presiding as judges of said court, Honorable E. W. Peck, chief justice; Honorable Tho's M. Peters, associate justice; Honorable B. F. Saffold, associate justice.

MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, appellants,
vs.
I. CLIFTON MOSES ET AL., APPELLEES.

Transcript of the record and proceedings had in the chancery court in above-stated cause, filed in the supreme court of Alabama 19th day of February, A. D. 1872.

D. B. BOOTH,
Clerk Supreme Court, Ala.

MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, appellants,
vs.
I. CLIFTON MOSES ET AL., APPELLEES.

Appeal from the chancery court of the county of Mobile.

Submis'ion of cause.

FEBRUARY 23, 1872.

Argued and submitted on briefs, and cause held under advisement until the June term, A. D. 1872, of the supreme court of Alabama.

D. B. BOOTH, *Clerk.*

67 *Caption.*

Be it remembered that a regular term of the supreme court of the State of Alabama, was begun and held according to law at the capitol, in the city of Montgomery, on the first Monday of June, A. D. 1872, being the 3rd day of said month.

Present and presiding as judges of said court, Honorable E. W. Peck, chief justice; Honorable Tho's M. Peters, associate justice; B. F. Saffold, associate justice.

Opinion supreme court

MAYOR, ALDERMEN, & COMMON COUNCIL of the City of Mobile, appellants,
vs.
I. CLIFTON MOSES ET ALS., APPELLEES.

B. F. SAFFOLD, *J.:*

I hold the act to establish the Mobile Charitable Association, &c., if obligatory on the State as a contract at all, to be so for the term of ten years. It requires the association to pay, or caused to be paid, for the use of the public schools of Mobile County, "the sum of one thousand dollars, and annually thereafter a like amount, for the term of ten years, or so long as said partnership shall choose to do business under the provisions of this act." The payment of the one thousand dollars annually is disclosed to be the consideration upon which the privilege is granted. The 4th section enacts "that this act shall remain in full force and effect for ten years, upon the consideration herein contained,
68 during which time said partnership company shall have the right to exercise the privilege and franchise herein given, any law to the contrary notwithstanding." My construction of the language quoted is that the company may terminate the agreement at pleasure, but that the State cannot do so before the expiration of the ten years, except in case of forfeiture.

But has the State authority, under the State constitution, to sell to a collection of persons, whether a partnership or a corporation, an exclusive privilege to carry on a lottery? The people generally are prohibited from doing so without the legislative sanction. (Revised Code, 3616.) No public law gives this sanction.

Article 1, section 32, of the State constitution, declares "that no title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State." To confer a title of nobility is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people. It is not necessarily hereditary, and the objection to it arises more from the privileges supposed to be attached than to the otherwise empty title or order. These components are forbidden separately in the terms "privilege," "honor," and "emolument," as they are collectively in the term "title of nobility."

The prohibition is not affected by any consideration paid or rendered for the grant. Its purpose is to preserve the equality of the citizens in respect to their public & private rights.

69 How shall we distinguish these prohibitions from the undoubted right of the State to grant certain franchises to particular individuals in exclusion of others, as a ferry or a corporation, or to contract with its citizens as for the construction of public works? The theory of our Government is the recognition of the utmost liberty of the citizen,

consistent with the welfare of the society. No restraint imposed by law can find justification elsewhere than in the consideration of the public good. There are necessities and conveniencies that can only be supplied to the public by committing the duty or privilege of doing so to a few. One ferry or toll-bridge is sometimes secured only by forbidding two.

Extreme cases sometimes illustrate a principle when intermediate ones serve only to confuse. The right of way for the construction of a railroad is conceded to be a fit subject for the exercise of the State's right of eminent domain, though the recipient is a private party. But a proposition to confer upon the same party the exclusive privilege of selling drugs or liquors would be justly regarded as an outrage. The test of the State's authority, therefore, is this: the privilege that can be conferred must conduce to the public good, and be such as is obliged to be committed to a few in order to be available.

In further proof of this test, the power of the legislature to charter corporations not municipal, heretofore not questioned, has been
70 specially granted by the constitution, and restricted to the passage of general laws, from the benefits of which none are excluded who may comply with the conditions prescribed. (Constitution, art. 1, sect. 1.) This change of the fundamental law was doubtless due to the conviction that the prohibition against exclusive privileges had not been sufficiently observed by the legislature and the courts.

In view of this more stringent guaranty of the equality of the citizens, shall we say that the legislature has power to sell for a term of years to a partnership the right to set up and carry on a lottery, and to fine and imprison the rest of the people if they do the same. Suppose I. C. Moses & Co. alone, of all the people, were forbidden to set up a lottery or to sell dry goods or groceries, the discrimination would not be based on any consideration of the public good, but would to the public detriment.

If the test I have proposed be not the correct one, and sufficiently definite, whence come the mala prohibita. Blackstone says: "Those rights which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectual' invested in every man than they are. Neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature
71 has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural duties such as, for instance, the worship of God, the maintenance of children, and the like, receive any stronger sanction from being so declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors that are forbidden by the superior laws, and therefore styled mala in se, such as murder, theft, and perjury, which contract no additional turpitude from being declared unlawful by the inferior legislature, for that legislature, in all these cases, acts only, as was before observed, in subordination to the great Law-giver, transcribing and publishing his precepts. So that upon the whole, the declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society and more effectually carrying on the purposes of

civil life. (Vol. 1, p. 54.) Experience has since shown a necessity for controlling somewhat the discretion of the legislature in the interest of freedom of personal action; and hence come the rights "reserved to the people."

To prohibit the pursuit of necessary business, or to commit it
72 to a few, to the exclusion of the rest of the people, would be a flagrant usurpation on the part of the legislature. Setting up a lottery is conceded to be the subject of the mala prohibita. Therefore either the act in question confers an unconstitutional privilege, or the law prohibiting the people generally from setting up lotteries, withholds a constitutional or reserved right. There is no doubt about which must fall.

This act is unique in its structure, if not commendable. It purports "to establish the Mobile Charitable Association for the benefit of the common-school fund of Mobile County, without distinction of color." The only benefit derived by the schools is the money paid as the consideration of the franchise. A charitable association is supposed to have for its object the relief of suffering humanity. The purpose of I. C. Moses & Co.'s franchise is to put money in their purses without rendering an equivalent for it, and without regard to the reckless gambling propensities it may excite in the community. The application of the words "without distinction of color" is left to conjecture. Article 4, section 2, of the State constitution, says: "Each law shall contain but one subject, which shall be clearly expressed in its title." There is nothing in this act correspondent with the laudable subject so clearly expressed in its title.

I think the injunction ought to be dissolved on account of the
73 invalidity of the act in question, and because, if valid, it requires the distribution of prizes to be fairly made, which is not the case in the games called keno & roulette.

BECK, *C. J.*, concurs in this opinion as to the unconstitutionality of the act.

PETERS, *J.*:

I cannot concur in the reasons assigned by the majority of the court for the judgment pronounced in this cause. A brief statement of the facts and the law, as they impress my mind, will show the grounds of my dissent.

On the 31st of December, 1868, there was approved by the governor of this State an act of the general assembly entitled "An act to establish the Mobile Charitable Association for the benefit of the common-school fund of Mobile County, without distinction of color." The first section of this law, omitting the enacting clause, is in the following words: "That I. Clifton Coses and Fred. H. Fowler, of Mobile, Alabama, and Eugene Beebe, of Montgomery, Alabama, and their associates, as partners, shall have the full right and authority to form themselves into a partnership association, to be known under the firm-name and style of "I. C. Moses & Co.," or such other name as they may designate, for the purpose of receiving subscription and to sell and to dispose of certificates of subscription, which shall entitle the holder thereof to such prizes as may be awarded
74 to them, which distribution of award shall be fairly made in public by casting of lots or by lot, chance, or otherwise, in such manner as to them may seem best, to promote the interest of the school-fund of Mobile County, which said distribution of award and prizes shall be made at their office in the city of Mobile or such other place or

places in the State, as they may direct." (Pamph. acts, 1868, p. 511, sect. 1.) For the "full right and authority," thus given, the company above said agreed to pay the board of school commissioners of Mobile County, for the use of the public schools of said county, the sum of one thousand dollars, and annually thereafter a like sum, for the term of ten years, or so long as said partnership shall choose to do business, under the provisions of said act. This statute confers the "privilege and franchise" upon the "partnership company" thereby created, for ten years, "upon the consideration therein contained," any law to the contrary notwithstanding. (Acts 1868, p. 511, 512, supra., No. 167.) The first one thousand dollars was properly paid. This was an acceptance of the terms proposed in the act, and vested the company with the rights & franchise therein conferred. (Manaway vs. The State, 42 Ala., 375.) The law in question establishes a "franchise" of a peculiar character. A franchise, during the period of its continuance, is said to be an incorporeal hereditament. At common law, it is a loyal privilege or branch of the King's prerogative subsisting in the hands of the subject, and it arose from the King's grant, (2 Bla. Com. p. 37, 38, morg.)

75 With us they are conferred by grant from the Government, and are vested in individuals. (Bank of Augusta vs. Earle, 13 Pet., 519, 595, Taney, C. J.) They contain an implied covenant on the part of the Government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. The Government cannot resume them at pleasure, or do any act to impair the grant without a breach of contract. (3 Kent., 458, 459.) In this definition I use the language of Chancellor Kent, a text writer of but little less authority than a judicial opinion. It seems to me that it hardly needs an argument to show that such a grant of franchise or privilege cannot be impaired by a repealing act. It is also patent to my mind that the general assembly has power to make such a grant, and that this power is not intended to be interfered with, by the thirty-second section of the first article of the State constitution. The mere recital of this section of our fundamental law, without more, would seem to refute this idea. I quote its words, so far as they apply to this case. They are these: "No title of nobility or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State." (Const. Ala., art. 1, sect. 32.) These words scarcely need interpretation to find out their true sense, that is, the sense in which they were used by the people in their highest State law. Obviously the people intended, by these words, to impose some limitation on the legislative will

76 of the general assembly. But they did not intend to go beyond what had formerly been customary. They did not intend to cut off the power to grant, for limited periods, merited distinctions and honors to the citizens who had rendered great and important services to the State, or to grant privileges or emoluments to be used for the public good. In other words they did not intend to prohibit all right to grant any privilege, franchise, or emolument whatever. Had this been their purpose, the language used would have been without any qualifying and limiting adjective. The word "hereditary" would have been left out of the sentence altogether. This word qualifies the whole series of particulars enumerated in the sentence, as if it had been repeated before each. The State constitution of 1819, contains a section of similar import with that above quoted, and almost in the identical words. Yet many franchises and exclusive privileges were granted under it, without objection, such as, the right to establish toll-bridges, toll causeways, ferries, and the supplying cities with pure water and gas lights.

(Const., Ala., 1819, art. 1, sect. 26; Clay's Dig., p. 27; Code of Ala., p. 31; Revised Code, sections 1383, 1389; Mobile Water Works vs. Montgomery Gas Works. And see the discussion in Dale vs. Governor, 3, Stew., 387; Stein vs. Mayor of Mobile, 17 Ala., 234, S. C. 24, Ala 591; People vs. Utica Ins. Co., 15 John, 358; Pres'd't, &c., of Newburg & Cocheeto Turnpike Road vs. Miller, 5 John, Ch. R., 101; Mico vs. Tallassee Br.
77 Co., January term, 1871, head notes, p. 21.) The power to grant and confer privileges, honors, and emoluments intended to be prohibited were such as were "hereditary," and not such as were limited to a reasonable length of time. Here the limitation was only ten years at the most, or "so long as the said partnership shall choose to do business under the provisions of" said act. "And whenever said company shall fail to pay said sum according to the provisions of said act, then and in that case, their right to do business shall cease." (Acts 1868, p. 511, 512, sect. 2, supra.) Then, if the right is a franchise, a privilege purchased from the State upon the consideration, it is a contract and cannot be repealed. In Colonel Sam Dale's case, involving a like question, Lipscomb, C. J., declares: "The only question, it seems to me, that can be raised in this case is, whether a contract has been made between the State of Alabama and the plaintiff, Dale, by which he has acquired a vested right to the amount of money directed to be paid to him by the act of 1821. If such a contract was enacted by that act, I have too much respect for the court of which I am a member, to waste time in urging any argument in favor of the position; that it is not only our right, but our duty, and one that cannot be evaded to declare any subsequent act of the legislature, abrogating the contract wholly void. This doctrine is now too well settled to admit of a controversy." (Dale vs. The Governor, 3 Stew., 387, 403.) Add this to what has already been said against the validity of the repealing act of March 8, 1871,
78 and the argument would seem to be complete. (Pamph. acts, 1870, 1871, p. 217, act No. 180.) The repeal was of no validity, and did not in any wise effect the appellees' rights, whatever these may be. In this I differ and dissent, with respectful regret, from the conclusions of the majority of the court. Nor is this a corporation such as the legislature can "alter, amend, or repeal." This power is given only where there is a general law of incorporations or special act passed pursuant to the article of the constitution on "corporations." (Const. Ala., art. XIII, sect. 1. See pamph. acts of 1870, 1871, p. XXVI: "Corporations.") This is not such a law as those there referred to.

Another objection to the law first above quoted, under which the appellees seek to justify their proceedings is, that its title is defective. If there were such a class of objections known to judicial tribunals as petulant objections, I would be inclined to put this objection in that class. Certainly a good law ought not to be driven out of court, because its authors were not critically skillful in the invention of names. That is, that they were not persons who could split and divide a hair, "twixt north and northwest side." It is true the constitution commands that "each law shall contain but one subject, which shall be clearly expressed" in its title. (Const' Ala., art. 10, section two. See pamph. acts, 1870, 1, p. 8.) By reference to the law under discussion, it will be seen that its title contains but one subject, that is to say, the
79 "establishment of The Mobile Charitable Association, for the benefit of the common school-fund of Mobile County, without distinction of color." And this is very clearly expressed. It is not to be expected that the details of "the business" of the association, is to be set out in the title of the law. Else, this would make the

title, the law itself. In discussing this novel feature in legislation, a distinguished and experienced judicial officer uses the following language: "It would be most mischievous in practice, to make the validity of every law depend upon the judgment of every judicial tribunal of the State, as to whether an act or bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge. No practical benefit could arise from such inquiries." (Prim vs. Nicholson, 6 Ohio, N. S., 179.) When the title fairly indicates the main purpose of the law, this is enough. (Cooley's Const. limit, p. 141, et seq. and cases there cited.) In this view of the constitutional restriction above quoted, I cannot concur with a majority of the court, but respectfully dissent. (44 Ala., 639, 646.)

There is one other question that remains now for further consideration. That is this: Does the statute of December 31, 1868, authorize "I. Clifton Moses & Co.," to *do* the "business," for which they claim protection in their bill? If it does, then I think they have shown sufficient grounds to invoke the aid of the court to protect them
80 in the further continuance of the same, until they make default in the payment of the annual sums required by the act. If it does not, then they are entitled to no relief; and their injunction should be dissolved and their bill dismissed with costs. Then, what is the "business" the "association" are entitled to pursue under the act? The act declares that the "association" was allowed to be formed "for the purpose of receiving subscriptions, and to sell and dispose of certificates of subscription, which shall entitle the holder thereof to such prizes as may be awarded to them." (Acts supra. sect. 1, p. 511.) This is the means provided by the law to carry on "business" under the franchise. This may be done, whatever it may mean, without the violation of the statutes against gambling; that is, without keeping a gaming-table in the manner forbidden by the Revised Code. (Revised Code, section 3621.) The scheme of operations set out in the bill is clearly that of keeping or exhibiting "a table for gaming." The legislature did not intend to repeal this section of the code, by the law allowing the formation of this association, and turn loose upon society the evils thus restrained. I therefore concur in the judgment of the majority of the court.

PECK, *C. J.*

The act of the 31st of December, 1868, (book of acts, &c., pa. 511,) entitled "An act, to establish the Mobile Charitable Association, for the benefit of the common-school fund of Mobile County, without
81 distinction of color," did not create a contract between the State of Alabama and I. Clifton Moses and Fred. H. Fowler, of Mobile, Alabama, and Eugene Beebe, of Montgomery, Alabama, and their associates. It was a proposal merely, that would become a contract, when accepted by them, and paying to the board of school commissioners of Mobile County, for the use of the public schools of said county, the sum of one thousand dollars, as provided in the second section of said act; but it would not be a contract for the period of ten years, but only for one year from the date of the payment of said one thousand dollars. By said section, said associates were not bound to pay said sum of one thousand dollars annually, for the term of ten years, but only for so long as they might choose to do business under the provisions of said act.

As the said associates would be bound by such contract only

for the period of one year, from the date of each successive annual payment of said sum of one thousand dollars, the State could be bound for no longer time. It is of the essence of a contract, that it must be mutual; if both parties are not bound by it, neither is bound. (Whitworth & Wife vs. Hart, 22 Ala., 343.)

At the end of each year, therefore, the contract would end, and the said act would assume again the character of a proposal, and as the said associates had the right to choose whether they would con-
82 tinue or renew the contract, the State necessarily had the right to choose whether she would continue, or withdraw her proposal, and repeal said act. To hold otherwise would be to destroy all mutuality between the parties, and to take away one of the essential elements of a valid contract. The State chose to withdraw her proposal, and at a time when no contract, in fact, existed, to repeal said act. This she did by the act of the 8th of March, 1871, (Book of acts, pa. 217.)

The said act of 31st of December, 1868, being thus repealed, the subsequent payment of one thousand dollars, made by said associates to E. R. Dickson, as superintendent of common schools of Mobile County, on the 19th day of April, 1871, was made without any authority of law, and did not authorize them to do business under said act—did not create any contract between them and the State, and consequently gave them no authority—no right to exercise the privilege and franchise named in said act, and if in claiming to do so they violated either the laws of the State, or the city of Mobile against gaming, they were liable to be proceeded against and punished, in the same manner as other persons guilty of the same offense.

If this is a correct construction of said act, of the 31st of December, 1868, as I think it is, then, their bill filed to enjoin prosecutions against them, for alleged violations of the laws of the city of Mobile against gaming, and to restrain the appellants and others, from institut-
83 ing such prosecutions, is without equity, and the decretal order of the chancellor overruling appellants' motion to dissolve the injunction granted in this case, by the circuit court judge, is erroneous and must be reversed. And this court, proceeding to render such decree as the chancellor should have rendered: It is hereby ordered, adjudged and decreed, that the said decretal order of the chancellor, rendered in vacation, overruling appellants' motion to dissolve the injunction granted in this, be, and the same is hereby, reversed, and the said injunction is dissolved; and it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal in this court and in said chancery court.

Lodged and filed with clerk, 27th day of June, A. D. 1872.

D. B. BOOTH,
Clerk Supreme Court, Ala.

Judgment.

Supreme court of Alabama, June term 1872. 27 June, A. D. 1872.

MAYOR, ALDERMEN, & COMMON COUNCIL OF the City of Mobile,
vs.
I. CLIFTON MOSES ET ALS.

Come the parties, by their attorneys, and the record and the matters therein assigned as error being argued, and submitted on the briefs of the counsel for the parties, and duly examined and understood, it seems to the court that, in the record and proceedings of said chancery
84 court, there is manifest error.

It is therefore considered by the court that the said decretal order of said chancery court be reversed and annulled. And this court here, proceeding to render the judgment and decree which should have been rendered in the court below, doth order, adjudge, and decree, that said decretal order of said chancery court, rendered in vacation, overruling appellants' motion to dissolve the injunction in this case, be, and the same is hereby, reversed and annulled, and the said injunction is hereby dissolved. It is further ordered, adjudged, and decreed that said appellees pay the costs accruing on said appeal in this court and in said chancery court.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of Alabama, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between I. Clifton Moses and Eugene Beebe, as complainants in the chan-
85 cery court for the first district of the southern chancery division of the State of Alabama, and who are the appellees in the said supreme court of Alabama, and The Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassenis, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, were defendants in said chancery court of said first district, and who are appellants in said supreme court of the State of Alabama, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said I. Clifton Moses and Eugene Beebe, as by their complaint appears: We, being willing that error, if any hath
86 been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 30th of July, in the year of our Lord one thousand eight hundred and seventy-two.

N. W. TRIMBLE,

Clerk Circuit Court of the United States for the District of Alabama.

Allowed by—

E. W. PECK,
Chief Justice of the Supreme C't, Ala.

Lodged and filed in office clerk supreme court of Alabama, July 4, 1872.

D. B. BOOTH,
Clerk Supreme C't, Ala.

Writ of error bond.

Know all men by these presents that we, Ferrie Henshaw
87 Eugene Beebe, and John E. Bride, are held and firmly bound unto the Mayor, Aldermen, and Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, in the full and just sum of two thousand dollars, to be paid to the said Mayor, Aldermen, and Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillip, Lewis Kassens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this third day of July, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately, at a regular term of the supreme court of the State of Alabama, regularly begun & held, on the 1st Monday in June, 1872, in a suit depending in said court between the Mayor, Aldermen, and Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Cassens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, as plaintiffs in error in said court, and I. Clifton Moses
88 & Eugene Beebe, as defendants in error in said court, judgment was rendered against the said I. Clifton Moses and Eugene Beebe; and the said I. Clifton Moses and Eugene Beebe, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Mayor, Aldermen, and Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said I. Clifton Moses and Eugene Beebe shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their pl'a good, then the above obligation to be void; else to remain in full force & virtue.

FERRIE HENSHAW. [L. S.]
EUGENE BEEBE. [L. S.]
JNO. E. BRIDE. [L. S.]

Sealed and delivered in presence of—
JAMES Y. BRAME.

Approved by—

E. W. PECK,
Chief Justice Sup. C't, Ala.

Lodged and filed in office clerk supreme court Alabama, July 4, 1872.
D. B. BOOTH, *Clk Sup. C't, Ala.*

89 *Motion to revoke writ of error.*

Supreme court of Alabama, June term, 1872.

MAYOR, ALDERMEN, & COMMON COUNCIL OF the city of Mobile,
vs.
I. CLIFTON MOSES ET ALS.

Appellants in this cause move that the court order the decree rendered by this court be certified to the court below, with orders to proceed and dispose of the cause in conformity with the decree and opinion of this court, and that the granting of a supersedeas and writ of error to the Supreme Court of the United States be revoked, as improvidently granted, without authority of law.
July 10, 1872.

ROB'T H. SMITH,
Pro Motion.

To Messrs. JNO. ELMORE & SAM'L F. RICE,
Sol's for Appellees.

JULY 10, 1872.—Argued and submitted for decision.

Judgment on motion.

Supreme court of Alabama, June term, 1872, 22d July, 1872.

MAYOR, ALDERMEN, & COMMON COUNCIL OF the city of Mobile,
vs.
I. CLIFTON MOSES ET AL.

Come the parties, by their attorneys, and attorneys for appellants move the court to order the decree rendered in this court in this cause to be certified to the court below, with orders to proceed and dispose of this cause in conformity with the decree and opinion of this
90 court, and that the granting of a supersedeas and writ of error to the Supreme Court of the United States be revoked; and said motion being argued by counsel, and submitted and duly examined and understood, it is considered by the court that said motion be overruled and refused at appellants' costs.

Supreme court of Alabama.

I, D. B. Booth, clerk of the supreme court in and for the State of Alabama, do hereby certify that the within and foregoing pages, numbered from one (1) to ninety, (90,) both inclusive, contain a true and correct, full and complete transcript of the record and proceedings had in said supreme court of Alabama, in a cause therein lately pending, wherein The Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, were appellants, and I. Clif-

ton Moses and Eugene Bebee were appellees, as fully and completely as the same now appears of record and on file in my office, together with a true and correct copy of the writ of error and writ-of-error bond allowed in the aforesaid mentioned cause.

91 I further certify that said appellees, said I. Clifton Moses, and Eugene Bebee, made application for a writ of error and writ of-error bond to E. Wolsey Peck, chief justice of said supreme court of Alabama, to revise and reverse the judgment and decree rendered in the aforesaid mentioned suit by said supreme court of Alabama, at its said June term, 1872, which said writ of error and writ-of-error bond were allowed by said E. Wolsey Peck, chief justice of said supreme court of Alabama, as aforesaid, on the 3d day of July, A. D. 1872, as fully appears from said original writs hereto attached to this transcript.

In witness whereof I have hereto set my hand and affixed the official seal of said supreme court of Alabama, this the 2d day of November, in the year of our Lord one thousand eight hundred and seventy-two, (A. D. 1872.)

[SEAL.]

D. B. BOOTH,
Clerk Supreme Court of the State of Alabama.

92 Know all men by these presents, that we Ferrie Henshaw, Eugene Bebee, & John E. Bride, are held and firmly bound unto the Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, cheif of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistant cheifs of police, of said city of Mobile, in the full and just sum of two thousand ($2,000.00) dollars, to be paid to the said Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, cheif of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistant cheifs of police of said city of Mobile, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this third day of July, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately, at a regular term of the supreme court of the State of Alabama, regularly begun & held on the 1st Monday in June, 1872, in the suit depending in said court, between the Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, cheif of police, and Oliver Keeler, Thomas McPhillips, Lewis Cassens, and Jesse T. Cain, assistant cheifs of police of said city of Mobile, as plaintiffs in error in said court, and I. Clifton Moses & Eugene Bebee, defendants in error, in said court, judgment was rendered against the said I. Clifton Moses and Eugene Bebee; and the said I. Clifton Moses and Eugene Bebee having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, cheif of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, & Jesse T. Cain, assistant cheifs of police of said city of Mobile, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said I. Clifton Moses & Eugene Bebee shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea

good, then the above obligation to be void; else to remain in full force and virtue.

FERRIE HENSHAW. [SEAL.]
EUGENE BEEBE. [SEAL.]
JNO. E. BRIDE. [SEAL.]

Sealed and delivered in presence of—
JAMES Y. BRAME.

Approved by—

E. W. PECK.
Ch'f Justice Sup. C't of Ala.

(Indorsed:) Lodged and filed in office clerk supreme court of Alabama.

D. B. BOOTH,
Clerk Supreme Court of Ala.

JULY 4TH, 1872.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Alabama, greeting:

Because, in the record of proceedings, as also in the rendition of the judgment of a plea, which is in the said the supreme court of Alabama, before you or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between I. Clifton Moses & Eugene Bebee, as complainants in the chancery court for the first district of the southern chancery division of the State of Alabama, and who are the appellees in the said supreme court of Alabama, and the Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, and Jesse T. Cain, assistant chiefs of police of said city of Mobile, were defendants in said chancery court of said first district, and who are appellants in said supreme court of the State of Alabama, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a staute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and
94 the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said I. Clifton Moses and Eugene Bebee, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what

of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 3d of July, in the year of our Lord one thousand eight hundred and seventy-two.

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States
For the Dist. of Ala.

Allowed by—

E. W. PECK,
Chief Justice of the Supreme Court of Alabama.

(Indorsed:) Lodged and filed in office clerk supreme court of Alabama.

D. B. BOOTH,
Clerk Supreme Court of Ala.

JULY 4TH, 1872.

95 Lodged and filed July 4th, 1872.

D. B. BOOTH,
Clerk Supreme Court of Alabama.

The United States of America to the Mayor, Aldermen, & Common Council of the City of Mobile; Martin Horst, mayor; R. M. Quinn, chief of police, and Oliver Keeler, Thomas McPhillips, Lewis Kassens, & Jesse T. Cain, assistant chiefs of police of said city of Mobile, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Alabama, wherein I. Clifton Moses and Eugene Bebee, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment and decree, rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Wolsey Peck, chief justice of the supreme court of the State of Alabama, this 3d day of July, in the year of our Lord one thousand eight hundred and seventy-two.

E. W. PECK,
Ch'f Justice Sup. C't of Ala.

96 (Indorsed:) First div. No. 84. Mayor, Aldermen, & Common Council of the City of Mobile, vs. I. C. Moses & Eugene Bebee. Original.

We accept service of this notice.
November 5th, 1872.

R. H. &. R. I. SMITH,
Att'ys for Appellees.

(Indorsement on cover:) No. 529. I. Clifton Moses & Eugene Bebee, plaintiffs in error, vs. The Mayor, Aldermen, & Common Council of the City of Mobile et al. Alabama sup. c't. Filed 2d December, 1872.

Supreme Court of United States.

DECEMBER TERM, 1872

MOSES & BEEBE
vs.
CITY OF MOBILE *et al.* } No. 529.

Brief of P. PHILLIPS,

On Motion to Dismiss.

The plaintiffs in error filed their bill of complaint in the State Court, asserting their rights under a law of the State of Alabama, 31 December, 1868, to carry on the business of a lottery, and they complain that in so doing they have been several times arrested by various agents of the police, charged with gambling, and have been thus obstructed in the pursuit of said business.

The bill then prays that an injunction be issued to restrain Martin Horst, as Mayor of the city, together with the Aldermen and Common Council, as also M. Quin, Chief of Police, and his assistants, Keeler M. Phillips, Kassens and Cain, from interfering in their "carrying on the scheme of the roulette table and ball, or in the use of the scheme of the revolving oblong box and balls on the principle of the game called keno," &c., &c., p. 7. Writs of subpœna was also prayed to be directed to the defendants named.

This bill was filed on the 17 August, 1871, and on same day the Chancellor granted the injunction as prayed for. p. 12.

Subpœnas were served on all of the defendants, and they all answered from p. 14 to p. 32.

The principal answer is that of the city, which denied among other things that the complainants had fulfilled the conditions of the act under which they claimed the right of lottery, and that under pretext of its authority they were carrying on a corrupting system of gambling—which it is admitted they were determined to put down.

The answer insists that after a default of payment as required by the act, while it was still due and before it was paid, the Legislature, to wit: on the 8 March of 1871, repealed the said act under which the complainants claimed this right to carry on the system of gambling described in their bill.

It further insists, that the mode used in conducting this business is unauthorized by the act.

Upon the coming in of these answers a motion was made to dissolve the preliminary injunction, and this was denied by the decree of November 17, 1871, p. 34.

Under the statutory practice of the State, an appeal was taken from this order refusing to dissolve to the Supreme Court of the State, in which all of the defendants joined as appellants, and an appeal bond was duly executed. p. 35.

The cause was submitted to the Supreme Court of the State 23 February, 1872 on printed argument, and held under advisement until the June Term, 1872, when the following judgment was entered:

"It is therefore considered that the said decretal order of said Chancery Court be reversed and annulled, and this Court here proceeding to render the judgment and decree which should have been rendered in the

Court below, doth order, adjudge, and decree, that the said decretal order of said Chancery Court, rendered in vacation overruling appellants' motion to dissolve the injunction in this case, be, and the same is hereby reversed and annulled, and that the said injunction is hereby dissolved. It is further ordered, adjudged, and decreed that the said appellees pay the costs accruing on said appeal in this Court and in the Chancery Court.' p. 45.

Grounds of Motion.

1. That there is no Federal question in the record which authorizes this Court to exercise its appellate power.

2d. If there be, there is no final judgment to warrant its exercise.

As to the first ground the record is wholly silent. The claim of the complainants' is under a State act, and their complaint is that certain trespassers were interferring with their rights under it. The defence is that the rights insisted on were not warranted by the true construction of that act, that its conditions had not been complied with, and that while the default existed the legislation had repealed it.

The decision of the Chancellor extends only to a refusal to dissolve the preliminary injunction. He decides no question of federal jurisdiction.

On this refusal to dissolve, the case is taken to the Supreme Court, where that refusal is overruled and the injunction dissolved. There is here no federal question decided.

There is not even an assignment of errors in that Court raising such a question, and showing that the Court was asked to pass upon it. But if there had been, this Court would not thereby acquire jurisdiction.

Lessor Fisher v. Cockerell, 5 Pet., 248.

Where the federal question is raised in the Appellate Court is must be entered on the record which must show that it was in fact raised and decided, and this entry must be made by the order of the Court, and certified as part of the record.

Phillips' Prac. S. C., 2 Ed., 121.

The averment in the answer of the City, that the act had been repealed, in no wise asserted the power of the legislature to impair its obligation, admitting that such an obligation was created as falls within the prohibition of the Federal Constitution.

It places this repeal on the ground that as a condition precedent, the complainants were to make certain payments at specified times, that they failed to comply with the condition and so it says, "that after the said sum became due, and before it was paid, the legislature of Alabama, on the 8 March, 1871, repealed the said act," &c., p. 18.

It is not averred in the pleadings or does it anywhere appear in the record, that the question whether the repealing act impaired the obligation of the contract, was ever presented to the consideration of the Supreme Court, or influenced the judgment by which they reversed the order of the Chancellor and dissolved the injunction.

The frequent and well settled doctrine of the Court is, that the opinion of the judge or judges would not be regarded as part of the record in ascertaining whether a federal question had been passed upon, so as to give this Court the right of reviewing the judgment of a State Court.

Phillips' Prac. S. C., p. 117, 2 Ed.

But if we were to permit the plaintiff in error to refer to the opinions which are printed in the record, in which

alone can any reference to a federal question be found, it would not avail him in sustaining the jurisdiction.

The opinion of Saffold, J., p. 38, assails the act under which the complainants claim as invalid, because not authorized by the *constitution of the State.* His opinion thus concludes—

"The injunction ought to be dissolved on account of the invalidity of the act in question, and *because, if valid,* it requires the distribution of prizes to be fairly made, which is not the case in the games called keno and roulette," p. 40.

Peters, J., maintains the constitutionality of the act, which was, therefore, not repealable, but on consideration of the business done under it he says; "The scheme of operation, set out in the bill, is clearly that of keeping or exhibiting 'a table for gaming.' The legislature did not intend to repeal this section of the code, by the law allowing the formation of this association, and turn loose upon society the evils thus restrained. I, therefore, concur in the judgment of the majority of the Court, p. 43.

Peck, C. J., regards the act as a contract from year to year by the payment of $1,000. And as the associates would be bound by such contract, only for the period of one year from the date of each successive annual payment of said $1,000, the State could be bound for no longer time—at the end of each year the contract would end, and the act would assume again the character of a proposal. And as the said associates had the right to choose whether they would continue or renew the contract, the State necessarily had the right to choose whether they would continue or withdraw her proposal and repeal said act," p. 44.

It is therefore seen, that the point on which the two judges concurred is this—that the business, as carried

on by the complainants was not justified by the act, and was, in fact, gambling which turned loose upon society all the evils of this vice.

The question, whether an act of the legislature is violative of the constitution of the State, as also the question, what is the true construction of such an act, are for the local tribunal, and are not reviewable here.

There is therefore nothing, whether we search the record or examine the views of the judges that lends the least countenance for bringing the case to this Court.

On the announcement of the judgment, a writ of error was allowed, whereupon the appellants moved the Court for directions to the Court below to proceed in the cause in conformity to the opinion of the Court, and prayed that the allowance of the writ of error to operate as a supersedeas be revoked.

"This motion was denied, p. 47, so that this gambling, denounced by the judgment of the Court, is still carried on, and all interference by the city is prevented by the injunction preliminarily granted.

Independent of this, is the ground that there is no final judgment. The dissolution of the injunction still left the bill pending to be disposed of on its merits. The prayer is, "that upon the final hearing your honor would perpetuate the injunction, or grant such other relief as is meet and adequate in the premises," p. 7.

That from such a decree no appeal lies to this Court, has been frequently decided.

Verden v. Coleman, 18 How., 86.

The judgment of the Court is particularly invoked on the first ground for dismissal, as it would tend to bring this litigation to a speedier end.

P. PHILLIPS,
For Motion.

WASHINGTON, 17 *January*, 1873.

Supreme Court of the United States.

DECEMBER TERM, 1872.

J. CLIFTON MOSES and EUGENE BEEBE, Plaintiffs in Error,

vs.

MAYOR, ALDERMEN, AND COMMON COUNCIL OF THE CITY OF MOBILE, Defendants in Error.

ANTONIA ARCARDI, Plaintiff in Error,

vs.

THE STATE OF ALABAMA, Defendant in Error.

ARGUMENT FOR THE PLAINTIFFS IN ERROR.

When there is "oscillation" in the adjudications of the highest court of a State, involving not even more than the construction of a mere statute of the State, the Supreme Court of the United States is under no obligation to follow the decisions of such court, especially when to do so would be to immolate the law, simply because a State tribunal had erected the altar and decreed the sacrifice.

Gelpcke *vs.* City of Dubuque, 1 Wallace, 205.

But in the present cases it is not a mere statute of a State to be construed; that which the defendant in error calls a statute was, from the time when its provisions were accepted, *a contract.*

There are "laws which amount to *propositions on the part*

of the State which, if accepted by individuals, will become binding contracts."

Cooley on Const. Lim., 284.
Oliver Lee & Co.'s Bank, 21 New York Rep., 14.
The State *vs.* Heyward, 3 Rich. (So. Ca.) Law R., 389.
Home of the Friendless *vs.* Rouse, 8 Wallace, 430.
Philadelphia Association, &c., *vs.* Wood, 39th Penn. State Rep., page 73.
Boyd & Jackson *vs.* The State, 46 Ala., 329.

It is precisely that kind of law, or that kind of contract, upon which the plaintiffs in error here stand and claim.

The law here referred to is an act of the General Assembly of Alabama, entitled "An act to establish the Mobile Charitable Association for the benefit of the common school fund of Mobile county, without distinction of color," approved December 31st, 1868, and is found on pages 511 and 512 of the Pamphlet Acts of Alabama of 1868.

The propositions contained in this law were accepted over and over again by the person to whom they were therein made. The first (and essential) acceptance was by the payment in pursuance of that law of the first annual instalment of one thousand dollars, thereby required on the 2d day of February, 1869. The second (and superfluous) acceptance was by the payment in pursuance of that law, of the second annual instalment of one thousand dollars on the 30th day of November, 1869. The third (and superfluous) acceptance was by the payment in substantial pursuance of that law, on the 19th day of April, 1871; the earlier and timely payment of this third instalment having been prevented and restrained by litigation and claims of others without fault on the part of plaintiffs in error, and the beneficiary not only receiving this payment, but thanking the plaintiffs in error for their substantial and *bona fide* compliance with the laws.

This law was, at the June term, 1870, of the supreme court of Alabama, for the first time presented for the solemn judgment of that court in a case where a felony (forgery)

was charged, a case of such magnitude as to forbid the supposition that the highest court of a State would decide it without the fullest examination. In that case the State had omitted to prove that any payment had been made by the persons named in this law, consequently there was, in that case, no evidence of any acceptance of the provisions of the law by the persons named in it.

The supreme court of the State use the following language:

"The *only error* in the record is the failure, on the part of the State, to prove that the company had paid the $1,000 required, as a condition precedent to their right to set up a lottery. (Acts 1868, p. 5.) Without the performance of this condition the certificates were illegal and not the subjects of forgery." (Rev. Code, 3,616.)

"The objection does *not apply to the subsequent payments required.*"

Manaway *vs.* The State, 44 Ala. R., page 375.

In that important case the supreme court of Alabama deliberately and clearly decided the three following points: 1st. That the aforesaid act of December 31st, 1868, was valid; 2d. That there was *only one "condition precedent"* in said act, to wit, the payment of the *first* annual instalment of one thousand dollars; 3d. That all the subsequent instalments were nothing more than conditions subsequent.

No more correct decision was ever made by a court, as is evident from the broad, liberal, and even unguarded words of said act, and all the authorities which bear upon the acceptance of such questions and *seductive propositions.* The law of no civilized country permits a person or State by such *sweeping propositions* to draw citizens into their acceptance, and afterwards, without any restoration of the money thus extracted from them, to impair the force of the plain words by which the money was procured, especially when, as here, the real beneficiary makes no complaint, but is anxious that the entire contract should be performed.

Be it remembered that this sound decision was made at

the June term, 1870, *and before the commencement of the present cases;* and that by this decision it was clearly established that the law or act had the force of a *contract*, if the company had "paid the $1,000 required as a condition precedent to their right to set up a lottery."

The fact of such payment in pursuance of that law was not proved in Manaway *vs.* The State, but was a fact then in existence, and is clearly proved in the present cases. Indeed, not only one, but several of such payments are here clearly proved. Up to the time of that decision, the company having made at least two payments in pursuance of said law, and having thus unquestionably accepted the propositions contained in that law, the *contract* which became perfect by such acceptance and payment was expounded and treated as valid by all departments of the State government.

In every such case the Supreme Court of the United States has fully settled the "sound and true rule" to be as follows: (Wallace, 206.)

"If the contract, when made, was valid by the laws of the State as then expounded by all departments of the Government, and administered in its courts of justice, its *validity* and *obligation* cannot be impaired by any subsequent legislation or *decision of its courts altering the construction* of the law." * * * "The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law." * * "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Gelpcke *vs.* City of Dubuque, 1 Wallace, 206.

The identical conduct of the plaintiffs in error, which is the ground of controversy in the present cases, occurred *after* the decision in Manaway *vs.* The State, and is fairly attributable to that decision.

Yet after that decision has been made in terms, the import of which no intelligent citizen could misunderstand, and on the 8th day of March, 1871, the Legislature assumed

to pass an act purporting to repeal unconditionally the said act of December 31st, 1868, thus repudiating the obligation of the contract arising out of the previous acceptance of the propositions contained in the last-mentioned act.

This pretended repeal was passed after the first two annual instalments had been paid within periods to which the most ingenious critic could invent no objection, and whilst the plaintiffs in error were ready and willing to pay the third instalment and were restrained and prevented by litigation and claims of others from making it.

After this pretended repeal, the Supreme Court of the State seemed determined to put itself in line with the repudiating Legislature, and at the same time to elude the jurisdiction of the Supreme Court of the United States. This is evidenced by the opinion of that court in the present cases, which ignores its former decision in Manaway *vs.* The State, closes its eyes to said *pretended* repealing act, and with an apparent revival of a devotion to the constitution of the State, which seems to have been dead when Manaway *vs.* The State was decided, pronounces the first-above-mentioned act to be unauthorized by the State constitution. As if it were a fact that the State constitution prohibits the Legislature from making a contract of this kind to raise funds for the needed and great purpose of education.

In the meantime, and at its June term, 1871, the same supreme court of the State has solemnly decided that an act very similar in its propositions, passed by the same Legislature at the same session and for similar purposes, acquired the force and obligation of an inviolable *contract* from acceptance of its provisions by payment made in pursuance thereof.

Boyd & Jackson *vs.* The State, 46 Ala. Rep., 329.

The special attention of the Supreme Court of the United States is invited to the authorities cited by counsel and court in the last-mentioned case. It is one of the wonders of the world how the same court can hold, under the same State

constitution, that the act which was under consideration in the case last-above cited, was not only valid, but, upon acceptance of its provisions, became a *contract;* and yet, that the act first above-mentioned was unauthorized by the State constitution and was invalid either as a law or contract.

Conceding that the State constitution prohibits the grant of "hereditary" distinctions or "hereditary" privileges, that concession avails nothing to the defendant in error. For, in the present instance, there is a plain contract between the State and the individual partners mentioned in the act of December 31st, 1868: and this contract is founded upon, and supported by, a moneyed consideration actually paid, and devoted to a "municipal" purpose—education. Evidently the State, through its Legislature, may enter into contracts of this kind.

Conceding that the Legislature cannot create a corporation by special act, except for municipal purposes, yet the act of 1868 is for a municipal purpose, and does not create a corporation—it merely secures the enumerated privileges or rights, for the defined period, to the persons therein described, not as corporators, but distinctly as "partners." It does not provide for "*succession.*" The partnership is, in legal contemplation, clearly not a corporation, (Parsons on Part'n, 177, 267;) and it is the duty of all courts to put that construction on a statute which will make it consistent with the Constitution, rather than a construction which will bring it into conflict with the Constitution, and thus destroy it.

Wammack *vs.* Halloway, 2 Ala. R., 32.
The State *ex rel. vs.* Dawson, 39 Ala., 395-6.
Thompson *vs.* The State, 20 Ala. R., 62.
The Emily and Caroline, 9 Wheaton, 388.

The only remaining pretence for saying that the act of 1868 is violative of the State constitution, is based upon section 2 of article 4 of that constitution, which is in the following words, to wit:

"Each law shall contain but one subject, which shall be clearly expressed in its title."

The first construction of this clause of the Constitution was given in the case of Weaver *vs.* Lapsley, 43d Alabama Reports, p. 224. The Supreme Court in that case simply decided that "An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned, and to repeal paragraphs 2,876 and 2,877 of the Revised Code of Alabama," was void because the act contained "two separate and distinct subjects, having no connection with each other."

It was next discussed in Gunter *vs.* Dale County, 44th Alabama Reports, p. 639, where it was *liberally construed.* The court saying, "the law contains but one subject, though it deals with several branches of that subject, but they are all attingent and cognate to one subject matter. * * * *This is a sufficient compliance with the purpose of the fundamental law to rescue it from the vice of unconstitutionality,*" (p. 646.)

In Martin *vs.* Hewitt, 44th Alabama Reports, p. 418, this clause of the constitution is most liberally construed, (pp. 433, 435.)

In Farley, Smith & Co. *vs.* Dowe, 44th Alabama Reports, p. 325, the "act for the relief of laborers and employees" was assailed as unconstitutional. It was urged that no one could tell from the title of the the act what was the purpose of the law; that, therefore, the subject was not clearly expressed in the title, and the act according to the train of reasoning in Weaver *vs.* Lapsley, *supra*, was void. This proposition the court *promptly denied.*

In *Ex parte* Upshaw, 44th Alabama Reports, 234, the court say: "The constitution does not forbid the incorporation into a law of everything needful to the proper operation of the one subject to which it is limited."

In the still later case of *Ex parte* Selma and Gulf Railroad

Company, 45 Alabama Reports, p. 773, the doctrine is broadly laid down that "*the General Assembly has the same right to construe the* constitution of the State that the courts have, and where the question is one in which a liberal construction may be made, the legislative construction will not be condemned, unless it is very clearly wrong." In that case Weaver *vs.* Lapsley, 43d Alabama Reports, is commented on the right of the legislative to fix a liberal construction fully admitted. Indeed, it is said in that case that "*the Supreme Court* passes beyond the wise limits of its powers when it goes into criticisms (minute) *in order to controvert the legislative construction.*"

The same clause of the constitution was again construed in the still later cases of Falconer *vs.* Robinson, 46 Alabama Reports, 340. In this case a most latitudinarian construction was given the constitutional provision in question. See the argument for rehearing which was denied, 46 Alabama Reports, 350.

From these cases, *the only adjudications upon this clause of the constitution, which became of force in* 1868, it will be seen that the constitutional provision has no where been strictly construed, save perhaps in the first case. All the other and later constructions have been liberal, and the right of the Legislature to construe this part of the constitution for itself, *broadly* conceded. See also the dissenting opinion of Justice Peters in the present case.

It will be perceived on examining these cases that the only rule established by the supreme court of Alabama, is this: If the court deem the law assailed a good law, it will construe this provision of the constitution liberally; if the court deem the law assailed a bad law, it will construe this provision of the constitution strictly. In other words, the supreme court of Alabama, by its variant and flexible construction of this clause of the constitution, exercises an illegitimate and irresponsible *veto* power over the Legislature. The Supreme Court of the United States cannot be expected to follow and sustain this whimsical and dangerous *veto* power.

If the act establishing the Mobile Charitable Association is unconstitutional by reason of its subject not being clearly expressed in its title, it is difficult to see by what reasoning the case of *exparte* Selma and Gulf Railroad Company (45 Alabama Reports, p. 773) and the other decisions referred to, can possibly be sustained.

What is said by the Chief Justice in Martin *vs.* Hewitt, 44 Ala. Rep., on page 433, is sufficient to destroy the pretence of unconstitutionality as grounded on section 2 of article 4 of the State constitution.

The "oscillation" of the State supreme court on the construction of this clause of the constitution certainly ought to free all other courts from subjugation or blind submission to its views in any particular case.

The truth is prominent that until the Legislature passed its act of repeal in March, 1871, the supreme court of the State maintained the validity of the act of December 31st, 1868; and that after that so-called repeal, the same supreme court (the Hon. Thomas M. Peters dissenting) held the same act invalid. The truth is equally conspicuous that there is really nothing which can justify this last-mentioned decision of the mere majority of the court, unless said repealing act is valid. And it is undeniable that this repealing act is in conflict with that provision of the Federal Constitution, which protects contracts from impairment by the action of State functionaries. If the Supreme Court of the United States cannot in such cases preserve the obligation of contracts with a State against impairment by any of the departments or functionaries of that State, it seems inevitably to follow that the State by a mere form or device can elude the jurisdiction of the Supreme Court of the United States, and also the substance and spirit of that provision of the supreme law of the land, which was designed to preserve the obligation of all contracts, and especially of all contracts to which the State itself is a party. The former decisions of the Supreme Court of the United States establish the proposition

that no State functionaries can thus elude the jurisdiction of the highest court of the Union, or the supreme law of the land.

The Bridge Proprietors *vs.* The Hoboken Company, 1 Wallace, 116.
Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.
Furman *vs.* Nichol, 8 Wallace, 44.
Home of the Friendless *vs.* Rouse, 8 Wallace, 430.
Gelpcke *vs.* City of Dubuque, 1 Wallace, 206.

The first payment (in February, 1869,) was clearly in time, and was an acceptance of the propositions of the act of December, 1868. The act did not reserve to the Legislature any power to repeal the act, or to impair any right acquired under it, or to declare or adjudge a forfeiture. Forfeitures are not favored. Even if any subsequent payment was not made in strict time, it was nothing more than *a cause of forfeiture* and could be enforced only in a direct judicial proceeding instituted for that purpose. The Legislature could not, for such cause, declare a forfeiture or deny the persons who had made the first payment the opportunity to show cause why a forfeiture should not be adjudged. The repealing act is such denial, and is the plain assumption of judicial power forbidden to the Legislature.

If any opportunity to show cause had been allowed, the persons who had paid their money under the act of December, 1868, could have obtained the benefit of the settled principles, that when conditions are subsequent and are substantially performed, if it answer the purpose as well, and if no injury can result from it, they are held to be well performed. And they could also have had the benefit of the *waiver* of the beneficiary, evidenced by the acceptance of the third and subsequent payments by that beneficiary.

Any question which, if decided by the State court in a civil case, would be revisable by the Supreme Court of the

United States, is revisable equally when decided in a criminal case.

Twitchell *vs.* The Commonwealth, 7 Wallace, 321.

The court of chancery ought always to protect by injunction, privileges, or franchises conferred by statute, when their exercise is interfered with and threatened with continued interference.

Mayor *vs.* Rodgers, 10th Ala. Rep., 37, and cases there cited.

The injunction in such case is special, and indeed is the whole case. The supreme court of the State having dissolved the injunction and decided that no injunction shall be allowed, its judgment or decree is final in any case of this kind, where the special injunction is the only relief that is asked or that can be granted.

McBrayer *vs.* Hardin, 7 Iredell's Equity Rep., 1.
Purnell *vs.* Daniels, 8 Iredell's Equity Rep., 9.
Poor *vs.* Carleton, 3d Sumner's Reps., 70.
Maxwell *vs.* Ward, 11th Price's Rep., 17.

The judgment dissolving the injunction is final for purposes of an appeal.

Thomson *vs.* Dean, 7 Wallace, 342; 6 Howard, 204.

In each of these cases the jurisdiction of the Supreme Court of the United States is clear, unless the dangerous admission is made that State courts by device or ingenuity can elude and defeat that jurisdiction.

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